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No. 07-_____

IN THE
SUPREME COURT OF THE UNITED STATES

VENETIAN CASINO RESORT, LLC,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in limiting the scope of "incidental" activities protected under this Court's *Noerr-Pennington* doctrine in the context of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), to conduct that is a necessary prerequisite to direct petitioning, or whether *Noerr-Pennington* instead establishes a generic rule of construction under which courts must construe federal statutes so as to avoid burdening conduct that implicates the protections of the First Amendment's Petition Clause unless the statute clearly provides otherwise, as the Ninth Circuit has held based on this Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

2. Whether an employer's broadcast of a message warning nonemployee union demonstrators that they were trespassing on its privately-owned sidewalk, and its attempt to make a "citizen's arrest" of one of those demonstrators for trespass, were "incidental" to the employer's petitioning activities of contacting law enforcement and filing a lawsuit for declaratory and injunctive relief to protect its property right to exclude trespassers from its sidewalk.

3. Whether an employer's report to law enforcement of its attempt to make a "citizen's arrest" of a nonemployee union demonstrator on the employer's privately-owned sidewalk constitutes direct petitioning activity that is protected under the First Amendment and the *Noerr-Pennington* doctrine, notwithstanding the fact that in subsequent litigation the sidewalk was held to constitute a First Amendment "public forum."

PARTIES TO THE PROCEEDING

The petitioner here is Venetian Casino Resort, LLC, which was the petitioner and cross-respondent in the Court of Appeals. The respondents here are the National Labor Relations Board, which was the respondent and cross-petitioner in the Court of Appeals, and Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 and Bartenders Union Local 165, which was an intervenor in the Court of Appeals in support of the Board's cross-application for enforcement of the Board's order against petitioner.

CORPORATE DISCLOSURE STATEMENT

Petitioner's parent corporation is Las Vegas Sands, LLC, which is the sole member of petitioner. The sole member of Las Vegas Sands, LLC is Las Vegas Sands Corp., which is publicly traded on the New York Stock Exchange, and is the only corporate party or affiliate that has issued shares of stock to the public.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Venetian Casino Resort, LLC (the "Venetian") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, App., *infra*, 1a-24a, is reported at 484 F.3d 601. The decision and order of the National Labor Relations Board ("NLRB" or "Board") in the unfair labor practice proceeding, App., *infra*, 25a-63a, is noted at 345 N.L.R.B. No. 82.

JURISDICTION

The opinion of the Court of Appeals, App., *infra*, 1a-24a, was issued on May 8, 2007. A petition for rehearing and suggestion rehearing en banc were

...nied on August 15, 2007. App., *infra*, 64a-65a. The Court of Appeals filed an order on August 15, 2007, approving and adopting the Board's proposed judgment as the judgment of the Court of Appeals. App., *infra*, 66a-71a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("Section 7" of the "NLRA" or "Act"), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), states as follows:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;

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STATEMENT OF THE CASE

I. Factual Background

The Venetian is a luxury hotel and casino resort in Las Vegas, Nevada, on the former site of the Sands Hotel & Casino and on the portion of Las Vegas Boulevard commonly known as "the Strip." App., *infra*, 2a. Because the development was expected to substantially increase traffic in the area, Clark County, Nevada expanded Las Vegas Boulevard by one lane along the front of The Venetian, displacing a publicly-owned sidewalk. *Ibid.* The Venetian negotiated an agreement with the Nevada Department of Transportation ("NDOT") under which the Venetian was to build a new sidewalk on its property adjacent to the newly-expanded Boulevard. App., *infra*, 2a, 34a-35a. The agreement did not require the Venetian "to explicitly dedicate a public right-of-way for a new public sidewalk." App., *infra*, 35a-36a. In February 1999, when the public sidewalk was demolished, the Venetian created a private temporary pedestrian walkway on the same portion of its property where the new sidewalk would eventually run. App., *infra*, 2a-3a.

Also in February 1999, the Venetian learned that the Culinary Workers Union, Local 226 and Bartenders Union, Local 165 (collectively the "Union") planned to hold a rally on the Venetian's private temporary walkway. App., *infra*, 3a, 36a. The Board

found that this demonstration was intended "to protest [the Venetian]'s labor policies." App., *infra*, 36a.

The Venetian attempted to prevent the demonstration from being held on the temporary walkway on the Venetian's private property. App., *infra*, 3a. A Venetian representative met with the Clark County District Attorney, who previously had opined that the walkway was only "quasi-private" and that it was "unclear" whether the Venetian had the right to exclude demonstrators. At this meeting, the District Attorney rejected the Venetian's request that his office enforce Nevada's trespass statute against the demonstrators. App., *infra*, 3a-4a. In a later conversation, the Las Vegas Police informed the Venetian's representative that the police would not arrest any demonstrators for trespass. App., *infra*, 4a. Clark County even granted the Union a permit allowing it to conduct the demonstration on the "sidewalk" in front of the Venetian and the adjacent northbound lane on Las Vegas Boulevard. App., *infra*, 38a.

In anticipation of the demonstration and subsequent litigation over its property rights to the temporary walkway, the Venetian hired a surveyor to mark the boundary between the walkway and Las Vegas Boulevard with orange paint, and posted signs stating that the walkway was private property. App., *infra*, 4a, 37a. The Venetian also decided to videotape the demonstration. App., *infra*, 37a n.9.

More than 1,000 persons participated in the Union's demonstration on March 1, 1999. App., *infra*, 4a. The demonstrators carried picket signs, chanted slogans, and marched up and down the Venetian's temporary walkway. Many demonstrators wore T-shirts, buttons, and pins with union messages. Several of the picket

signs contained a photograph of the Venetian's Chairman, Sheldon Adelson, under the words "PRIVATE SIDEWALK." At the top and bottom of the signs were the words "UNION RIGHTS/CIVIL RIGHTS/ONE AND THE SAME." App., *infra*, 4a. One of the most prominent chants was: "Who owns the sidewalks? We own the sidewalks! What kind of sidewalks? Union sidewalks!" App., *infra*, 4a, 37a-38a. Other chants stated, "Venetian no, Union yes," and "Hey, hey, ho, ho, union bustings got to go." *Ibid.* Toward the end of the demonstration, several individuals made speeches, including one who stated that the Venetian should operate the property "one hundred percent Union" and another who complained that the Venetian would not give former Sands employees preferential treatment in its hiring. App., *infra*, 4a.

During the demonstration, the Venetian repeatedly played over loudspeakers a recorded message advising the "culinary and union workers" that they were trespassing on private property and were subject to arrest under Nevada law. App., *infra*, 4a-5a. The Venetian also asked the police to issue citations to the demonstrators and exclude them from the Venetian's private walkway. App., *infra*, 5a. A Venetian security guard informed the Union's political director that he was being placed under "citizen's arrest" for trespassing, although they did not attempt to take him into custody. The next day, Venetian representatives contacted the police to report the incident. *Ibid.*

II. Venetian's District Court Lawsuit

Three days after the demonstration, the Venetian filed an action in United States District Court against county officials, the police department, and the Union.

The Venetian requested a declaratory judgment providing that its private sidewalk was not a First Amendment "public forum" and that the government's actions amounted to a "taking" of the Venetian's property in violation of the Fifth Amendment. The Venetian also sought to enjoin local and county officials from authorizing demonstrations on the Venetian's property and from refusing to enforce the Venetian's property rights. App., *infra*, 5a, 39a. The district court ruled against the Venetian and held that the private sidewalk was a "public forum" and that the Venetian was a "state actor" under the reasoning of this Court's "company town" case of *Marsh v. Alabama*, 326 U.S. 501 (1946). *See Venetian Casino Resort v. Local Joint Executive Bd.*, 45 F. Supp. 2d 1027, 1034-36 (D. Nev. 1999); App., *infra*, 5a-6a, 39a-41a. On appeal, a sharply-divided panel of the Ninth Circuit affirmed, and this Court denied certiorari. *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002); App., *infra*, 6a, 42a-44a.

III. Proceedings Before The Board

During the pendency of the Venetian's district court lawsuit, the Union filed an unfair labor practice charge which alleged that the lawsuit itself constituted a violation of Section 8(a)(1) of the NLRA. App., *infra*, 52a. But the NLRB Regional Director withdrew this allegation after this Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 536-37 (2002), which held that an employer's lawsuit cannot violate the Act unless it is both objectively frivolous and pursued for an unlawful retaliatory motive. Instead, the Regional Director issued an amended complaint on January 23, 2003, alleging that the Venetian violated

the Act when it: (1) summoned the police and asked that demonstrators be issued citations and excluded from the Venetian's private walkway; (2) played the trespass message over a loudspeaker; and (3) informed the Union business agent that he was being placed under citizen's arrest, and contacted the police to report the incident. App., *infra*, 6a.

After a trial, an administrative law judge issued a decision on June 12, 2003, concluding that the Venetian's conduct violated Section 8(a)(1). App., *infra*, 6a-7a. The NLRB affirmed this decision on September 30, 2005. App., *infra*, 7a. The Board rejected the Venetian's argument that its conduct was protected under the First Amendment, either as direct petitioning activity or as incidental to and inextricably intertwined with protected petitioning. App., *infra*, 6a-7a, 52a-58a.

IV. Proceedings In The Court Of Appeals

The Venetian filed a petition for review of the Board's order, and the Board filed a cross-application to enforce its order. App., *infra*, 7a. The Court of Appeals denied the Venetian's petition and granted the Board's cross-application in part. App., *infra*, 2a, 24a. The court held that the broadcast of the trespass warning and "the attempt to arrest the union official" were not protected under the First Amendment. The opinion stated that the court was remanding the matter for the Board to address "whether the First Amendment protected summoning the police." App., *infra*, 2a. The court also ordered entry of the judgment proposed by the Board, which stated in part that the Venetian and its officers, agents, successors, and assigns, shall cease and desist not only from informing any peaceful Union demonstrator "that he is being

placed under citizen's arrest," but also from "contacting the Las Vegas Metropolitan Police to make a report of the incident." App., *infra*, 66a, 68a.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals' Opinion Conflicts With The Ninth Circuit's Interpretation Of *BE&K* And Unduly Limits The Scope Of The *Noerr-Pennington* Doctrine In The Context Of Labor Law

Under the *Noerr-Pennington* doctrine, this Court construes federal statutes so as to avoid implicating activity that is protected by the First Amendment's Petition Clause. In *Eastern R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 142 (1961), the Court held that the railroad industry's "publicity campaign" against the trucking industry, including "[c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda and . . . other documents," did not violate federal antitrust statutes. Even assuming that the railroads were acting for anticompetitive purposes, the Court held their campaign was immune from antitrust liability because "the railroads were making a genuine effort to influence legislation and law enforcement practices." *Id.* at 144. The Court thus recognized that the Petition Clause protects not only direct petitioning of government, but activity that is "'incidental' to a valid effort to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 143).

This Court has twice considered the interplay between the NLRA and the Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court held that the Board may not enjoin the filing

or prosecution of a state-court lawsuit unless it "lacks a reasonable basis in fact or law" *and* was filed for an unlawful retaliatory motive. *Id.* at 747. The Court suggested in *dicta* that a lawsuit might be found unreasonable in any case where "judgment goes against the employer ... , or if his suit is withdrawn or is otherwise shown to be without merit." *Id.* at 747. But in *BE&K*, the Court repudiated its *dicta* from *Bill Johnson's* and squarely held that a "reasonably based but unsuccessful suit[] filed with a retaliatory purpose" cannot form the basis of a violation of Section 8(a)(1). *BE&K*, 536 U.S. at 536.

"In light of *BE&K*'s application of *Noerr-Pennington* to the NLRA," the Ninth Circuit has held that "the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (citation omitted). Under this standard, courts "must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause *unless the statute clearly provides otherwise*," and an intent to invade such freedoms will not be "lightly impute[d]." *Id.* (italics added, quoting *Noerr*, 365 U.S. at 138). As in *Noerr*, the protected activity in *Sosa* was not direct petitioning, but incidental thereto. The Ninth Circuit held that a pre-litigation letter demanding payment to settle potential claims in a threatened lawsuit could not form the basis of liability under federal racketeering law. *Sosa*, 437 F.3d at 942.

Unlike the Ninth Circuit in *Sosa*, the Court of Appeals below declined to even decide whether *Noerr-Pennington* applies "in labor law for 'incidental conduct,'" as opposed to the "direct petitioning, *i.e.*,

employer lawsuits," at issue in both *BE&K* and *Bill Johnson's*. App., *infra*, at 19a-20a. Yet, as the Court of Appeals recognized, "*Noerr* itself immunized from [antitrust] liability activity that was not direct government petitioning." App., *infra*, at 18a; *see Noerr*, 365 U.S. at 142. The Ninth Circuit in *Sosa* not only reached a similar conclusion in holding that conduct "incidental" to direct petitioning was immune from liability under federal racketeering statutes, but it did so by applying the "generic rule of statutory construction" that it gleaned from *BE&K* – an NLRA case. Without question, then, the Ninth Circuit's analysis in *Sosa* compels the conclusion that *Noerr-Pennington* immunity under the NLRA extends to "incidental" conduct.

Although the Court of Appeals stopped short of explicitly rejecting the Ninth Circuit's generic rule of statutory interpretation under *Noerr-Pennington*, it also did not purport to apply that rule. Instead, the Court of Appeals relied on two *factual* distinctions it perceived between the Venetian's pre-petitioning conduct and the litigation demand letter in *Sosa*: It found that "broadcasting the trespass warning message and making the 'citizen's arrest' ... are neither common features of litigation nor statutorily protected litigation privileges," and thus concluded that these activities were not "sufficiently close" to the Venetian's lawsuit to merit First Amendment protection. App., *infra*, at 23a. But these distinctions are entirely illusory. Nevada's trespass statute applies to "any person" who "[w]illfully goes or remains upon any land or in any building *after having been warned by the owner or occupant thereof not to trespass*." NEV. REV. STAT. § 207.200(1)(b) (italics added); *see* App., *infra*, at 21a. And as the Court of Appeals noted, Nevada law authorizes "[a] private

person" to make a citizen's arrest "[f]or a public offense committed or attempted in his presence." NEV. REV. STAT. § 171.126(1); *see* App., *infra*, at 5a n.2. Thus, Nevada law explicitly establishes both trespass warnings and citizen's arrests as "common features of litigation" and authorized means of responding to unlawful trespass.

The Court of Appeals also emphasized that the Venetian decided to sue for "forward-looking relief" rather than for trespass damages. App., *infra*, at 21a. The Court of Appeals was correct that the Venetian was seeking injunctive relief to protect its property rights, including its right to exclude trespassers. As a prerequisite for that equitable relief, the Venetian had to demonstrate the absence of an adequate remedy at law and that it would suffer irreparable injury absent an injunction. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Venetian Casino Resort*, 45 F. Supp. 2d at 1031. To establish the lack of an adequate legal remedy, the Venetian reasonably concluded that it had to engage in the incidental conduct to show that it had given the required warning under the trespass statute and that the police had failed to issue a citation after the Venetian reported its citizen's arrest the following day. App., *infra*, at 56a. In any event, *Sosa* instructs that the type of relief sought is not dispositive. The demand letter that the Ninth Circuit in *Sosa* found to be protected "incidental" conduct under *Noerr-Pennington* was not followed by any lawsuit at all, because the recipients decided to settle the claims alleged in the demand letter. *Sosa*, 437 F.3d at 926-27.

The Court of Appeals further contradicts *Sosa*, as well as *Noerr*, by suggesting that the Venetian was required to show that its pre-litigation actions were "necessary prerequisite[s]" to injunctive relief in order

to establish that the conduct was "incidental" to its lawsuit. App., *infra*, at 21a. As noted above, the Ninth Circuit in *Sosa* relied on the fact that the demand letter was a "common" feature of litigation, not a "prerequisite" to filing suit. *Sosa*, 437 F.3d at 936. And in *Noerr*, this Court held that the railroads' "publicity campaign" was protected as "incidental" conduct because it was part of "*a genuine effort* to influence legislation and law enforcement practices." *Noerr*, 365 U.S. at 144 (italics added). At the very least, the Venetian reasonably and genuinely believed that its pre-litigation actions were relevant to establish that it would suffer "irreparable injury" – a necessary prerequisite to obtaining the injunction the Venetian sought. *See Venetian Casino Resort*, 45 F. Supp. 2d at 1031.[1] The Court of Appeals' conclusion that the Venetian's reasonable and genuine beliefs were insufficient to establish "incidental" conduct conflicts with this Court's holding in *Noerr* and the Ninth Circuit's decision in *Sosa*.

II. The Court Of Appeals' Opinion Contradicts This Court's Holding In *Lechmere* And Misconstrues *Allied Tube*

The Court of Appeals relied on *Allied Tube* in holding that the Venetian's broadcasting of the

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[1] Indeed, the Norris-LaGuardia Act expressly requires an employer seeking an injunction in the context of a "labor dispute" to show, *inter alia*, that the trespassory acts would be committed or would continue "unless restrained," and "[t]hat the public officers charged with the duty to protect [its] property [were] unable or unwilling to furnish adequate protection." 29 U.S.C. §§ 107(a)-(e), 113(c). The Court of Appeals ignores Norris-LaGuardia and fails to explain how Venetian might have shown that the trespassory acts were likely to continue if it had not attempted to persuade the demonstrators to vacate Venetian's private property.

trespass statute to nonemployee demonstrators and its attempted citizen's arrest were not "incidental" to protected petitioning activity. App., *infra*, at 20a-22a. In *Allied Tube*, this Court held that the defendant violated antitrust law by exercising its market power to organize and orchestrate the product standard-setting process of "a private, voluntary organization" whose "standards are widely adopted into law by state and local governments." *Allied Tube*, 486 U.S. at 495. In finding that the defendant's conduct was not immune from liability under *Noerr-Pennington*, the Court explained that "private standard-setting associations" typically "include members having horizontal and vertical business relations," and their members undoubtedly "often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.... Accordingly, *private standard-setting associations have traditionally been objects of antitrust scrutiny*." *Id.* at 500 (emphasis added, citations and footnotes deleted). Indeed, the private standard-setting process that the defendant in *Allied Tube* manipulated "is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits." *Id.* at 506-07. In the Court of Appeals' view, the Venetian's pre-litigation conduct is of a type that "has long been held to be governed by the NLRA," and thus is not "protected as 'incidental' conduct" under *Allied Tube*. App., *infra*, at 21a.

But the Court of Appeals' characterization of the Venetian's conduct plainly contradicts the Supreme Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992), that an employer generally is entitled to exclude nonemployee union demonstrators from its

private property. In this context, then, such employer actions generally are *not* "governed by the NLRA." The Court of Appeals cites to cases where employers' attempts to dispel union demonstrators and place them under citizen's arrest were found to be unfair labor practices, App., *infra*, at 16a-17a, 21a, but all of those cases arose in materially different contexts from the instant matter. None involved the right to petition or an asserted property right under *Lechmere* to exclude nonemployees from the employer's property, and in three of the cases, "there [was] no dispute" that the employer lacked such property rights.[2] Not so here. The Venetian's federal court lawsuit was intended to vindicate its property rights over the very walkway on which the Union demonstration took place. App., *infra*, at 3a-6a. The Court of Appeals concedes that the Venetian's lawsuit "was, without question, a valid government petition." App., *infra*, at 20a.

Under *BE&K*, the Venetian's defeat in its reasonable efforts to protect its private property from

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[2] *See United Food & Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000) (Virginia trespass statute did not give employer the right to exclude union organizers from sidewalks that employer did not own or lease); *Indio Grocery Outlet*, 323 N.L.R.B. 1138 (1997) (undisputed that employer had no property right under California law to prohibit nonemployee organizers from picketing and handbilling on its premises), *enforced*, 187 F.3d 1080 (9th Cir. 1999); *Wild Oats Community Markets*, 336 N.L.R.B. 179, 181 (2001) ("the Respondent concedes that it did not have a property interest entitling it to exclude the union representatives"). The other case cited on this point, *D'Allessandro's, Inc.*, 292 N.L.R.B. 81 (1988), does not support the Court of Appeals' decision because it involved conduct not alleged herein – "disparate treatment of union activities" – and relied heavily on *Jean Country*, 291 N.L.R.B. 11 (1988), a decision this Court found to have misstated the law "[a]t least as applied to nonemployees." *Lechmere*, 502 U.S. at 538.

nonemployee demonstrators cannot be dispositive of the issue of whether its conduct was protected under the Petition Clause. Neither the Court of Appeals nor the Board disputed that all of the Venetian's actions were part of a good-faith attempt to protect its private property rights. *See* App., *infra*, at 56a-58a. Such actions ordinarily are immune from Board scrutiny under *Lechmere*. The Court of Appeals thus failed to sufficiently consider the "context and nature of [the Venetian's] activity," as *Allied Tube* explicitly requires, and reached a conclusion that plainly contradicts *Lechmere*.

The Court of Appeals further contradicted *Lechmere* by hypothesizing – without citation to facts or authority – that a holding in the Venetian's favor "would effectively eviscerate the fundamental protection section 7 seeks to provide for expressive activities by labor unions." App., *infra*, at 21a-22a. As *Lechmere* makes clear, labor unions and other nonemployees generally lack Section 7 rights to demonstrate on an employer's private property. Indeed, at the time of the Union's demonstration, it was presumptively unlawful for the demonstrators to picket on the Venetian's privately-owned sidewalk "without the written permission of the owner or pursuant to an order from a federal court or agency of competent jurisdiction." NEV. REV. STAT. § 614.160(1)(a). The existence of Section 7 rights in this case is premised entirely on federal court orders which found that the Venetian's sidewalk constitutes a First Amendment "public forum," App., *infra*, at 13a-16a – but that finding was not made until well after the Union's demonstration. App., *infra*, at 5a-6a, 20a. Extending *Noerr-Penninngton* immunity to the Venetian's good-faith attempts to protect its private property rights is

therefore entirely consistent with *Lechmere*, and the Court of Appeals lacks any basis for suggesting otherwise.

The Court of Appeals' reliance on *Allied Tube* is inapt for the additional reason that the defendant in that case "was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete." *Allied Tube*, 486 U.S. at 509 (emphasis added). By comparison, the Court of Appeals and the Board found only that the Venetian's actions "interfere[d] with the demonstrators' Section 7 rights" – not that the Venetian intended to violate such rights or acted with retaliatory motive. App., *infra*, 7a. To the contrary, the Board assumed that the Venetian "may well have acted in 'good faith' in this matter," but reasoned this was irrelevant because the Venetian's actions ostensibly were not protected under *BE&K* or *Noerr-Pennington*. App., *infra*, at 56a. The Venetian's undisputed good-faith intent to protect its property rights further establishes that the Court of Appeals' attempt to analogize the instant case to *Allied Tube* is strained and unavailing.

Unlike the defendant in *Allied Tube*, the Venetian has not adopted an "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." *Allied Tube*, 486 U.S. at 503. Nor is the Venetian's conduct remotely analogous to any of the examples of such attempts to influence governmental action that this Court found would be unprotected even if they were genuine. *Id.* at 503-04. Instead, the Venetian submits that under *Noerr-Pennington* and its progeny, its reasonable, good-faith attempts to protect its

private property rights were incidental to its injunction lawsuit and protected by the First Amendment. The Court of Appeals' decision contradicts these precedents.

III. The Court Of Appeals Directly Contradicts *Noerr* And *BE&K* By Enforcing The Board's Decision That Venetian's Direct Petitioning Activity Of Making A Police Report On The "Citizen's Arrest" Violated The NLRA

As the Court of Appeals acknowledges in its factual discussion, the Venetian's attempt to place a Union agent under "citizen's arrest" consisted of two events: (1) the Venetian's security guards told the Union agent that he was being placed under "citizen's arrest"; and (2) the next day, Venetian representatives "contacted the police and reported the 'arrest.'" App., *infra*, at 5a, 6a n.3. The Board expressly found that both the security guards' statements and the police report on the citizen's arrest violated Section 8(a)(1). App., *infra*, at 6a n.3, 7a, 26a, 59a. The Court of Appeals concluded without qualification that "the attempt to arrest the union official" was not protected under *Noerr-Pennington*, and thus enforced the Board's decision on this point. App., *infra*, at 2a, 24a.

In this additional respect, the Court of Appeals' decision cannot be reconciled with *Noerr* or *BE&K*. As Venetian argued before the Board and the Court of Appeals, its police report on the attempted citizen's arrest was a *direct* and "genuine effort[]" to "'influence ... law enforcement practices," and thus is protected under *Noerr*, 365 U.S. at 144. *See* App., *infra*, at 24a (citing Petitioner's Br. at 24), 53a. But the Court of Appeals did not explicitly address this argument, and instead affirmed the Board's unfair labor practice finding as to the attempted citizen's arrest – which

included the police report on the arrest. App., *infra*, at 2a, 24a, 26a, 59a, 66a, 68a.

The only issue that the Court of Appeals remanded for the Board's consideration was whether the Venetian's separate acts of "summoning the police" and asking them "to keep demonstrators off the sidewalk" are protected as direct petitioning activity under *Noerr*. App., *infra*, at 2a, 24a. But the Court of Appeals' affirmance of the Board's finding that the police report on the citizen's arrest violated Section 8(a)(1) is inconsistent with its remand on the issue of the Venetian's earlier summoning of the police.

The Court of Appeals' holding that the attempted citizen's arrest was not "incidental" to the Venetian's lawsuit, *see* pp. 8-12, *supra*, plainly does not resolve the issue of whether the Venetian's police report on the attempted citizen's arrest is further protected as direct petitioning activity under *Noerr* and *BE&K*. And if the police report constitutes protected petitioning, it follows ineluctably that the communication of the citizen's arrest to the Union official and the trespass warning message are additionally protected as "*incidental*" *to the police report*. Such actions are expressly authorized under Nevada's statutes pertaining to citizen's arrests and trespass, NEV. REV. STAT. §§ 171.126(1), 207.200(1)(b), and thus are a "common . . . feature" of attempts to have law enforcement protect private property from trespass. App., *infra*, at 23a (quoting *Sosa*, 437 F.3d at 936). Neither the Board nor the Court of Appeals suggested that these actions were objectively baseless or pursued for unlawful motives – and both showings plainly were required to take this activity outside First Amendment protection. *BE&K*, 536 U.S. at 536. This Court should grant review to resolve this additional conflict between

its precedents and the Court of Appeals' decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 12, 2007

APPENDIX A

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 17, 2006 Decided May 8, 2007

No. 05-1396

VENETIAN CASINO RESORT, L.L.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, INTERVENOR FOR RESPONDENT

Consolidated with
05-1439

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

Before: RANDOLPH, GARLAND AND GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: In response to a union demonstration on its sidewalk, the Venetian Casino Resort, LLC ("Venetian") took actions that the National Labor Relations Board ("NLRB" or "Board") concluded were unfair labor practices that violated section 8(a)(1) of the National Labor Relations Act

("NLRA" or "Act"). The Venetian broadcast a message over loudspeakers warning the demonstrators that they were committing criminal trespass, attempted a "citizen's arrest" of a union official, and asked the police to keep the demonstrators off the sidewalk. In this petition for review of the Board's order, the Venetian argues that its conduct, which we conclude the Board reasonably found was intended to interfere with a lawful demonstration, was nevertheless protected by the First Amendment. We conclude that the broadcast message and the attempt to arrest the union official were not so protected and therefore affirm the Board's decision on those points. Because the Board failed to address whether the First Amendment protected summoning the police, we remand this matter to the Board to address that question.

I.

The Venetian is a luxury hotel and casino in Las Vegas, Nevada built in 1999 on the site along Las Vegas Boulevard (commonly known as "the Strip") where the Sands Casino and Hotel once stood before it was razed to make way for the new resort. To accommodate the projected increase in vehicle traffic that the Venetian would attract, Clark County, Nevada expanded Las Vegas Boulevard by one lane, displacing the public sidewalk that previously ran in front of the Venetian's property. The Venetian agreed to build another sidewalk on its property running parallel to the new lane in Las Vegas Boulevard. In February 1999, when the public sidewalk was demolished to make way for the new lane in the boulevard, a temporary walkway was built where the new sidewalk would eventually run. At about the same time, it was

reported in the local media that the Culinary Workers Union, Local 226 and Bartenders Union, Local 165 (collectively, "Union") planned to hold a rally on the temporary walkway protesting the fact that unlike the Sands, its predecessor on the site, "the Venetian did not have a union contract." Official Record of Proceedings Before the National Labor Relations Board at 28, *Venetian Casino Resort, LLC*, 28-CA-16000 (April 3, 2003) [hereinafter Record of Proceedings]. A local newspaper described the demonstration as an element of the Union's "escalating labor battle" with the Venetian. Jeff German, *Sidewalk Showdown Set*, LAS VEGAS SUN, Feb. 23, 1999, at 1A. Although the Venetian had not yet begun hiring staff at the time of the demonstration, it had assembled an employment package for employees that, according to the Venetian's owner, was superior to the Union's. Id. It also would shortly begin the hiring process.[1]

The Venetian endeavored to prevent the union demonstration from taking place on the walkway. *Venetian Casino Resort, LLC*, 345 N.L.R.B. No. 82 (2005), 2005 WL 2451997 at *6. A representative of the Venetian met with the Clark County District Attorney to press the argument that the Union had no right to use the sidewalk for a demonstration because it was the Venetian's property. Record of Proceedings at 137-40. Prior to that meeting, the District Attorney publicly stated that the walkway was only "quasi-private" property, and that it was "unclear" whether the Venetian had the right to block or remove demonstrators from using it. Adrienne Parker, *Bell Sees Dispute on Venetian Sidewalks Going to Fed*

[1] The Venetian opened for business in early May of 1999, and began hiring employees several weeks prior to opening. Record of Proceedings at 94.

Court, LAS VEGAS SUN, Feb. 25, 1999, at 1A. At the meeting, the District Attorney explained that his office would not enforce the Nevada trespass statute against the demonstrators. Record of Proceedings at 140. In a subsequent conversation with the Las Vegas Police Department, the Venetian's representative was told that the police would not arrest any of the demonstrators for trespass. *Id.* at 141.

The demonstration took place on March 1, 1999. The Venetian marked its property boundaries on the walkway with bright orange paint and posted signs stating that the walkway was private property. More than 1,000 demonstrators, many wearing T-shirts, buttons, and pins with union messages, marched on the walkway. The demonstrators repeatedly chanted slogans, including, "Venetian no, Union yes," "Hey, hey, ho, ho, Union busting[']s got to go," and "Who owns the sidewalk? Union sidewalk." *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *6. Some carried picket signs with the words "UNION RIGHTS/CIVIL RIGHTS/ONE AND THE SAME" at the top and the bottom and a photograph of the Venetian's owner in the middle, under which was written, "PRIVATE SIDEWALK." *Id.* Speeches at the demonstration addressed the brewing labor dispute between the Union and the Venetian. *Id.* One of the speakers declared that the Venetian should be operating the new resort "one hundred percent Union." *Id.* Another complained that the Venetian would not be giving preferred treatment in its hiring to former employees of the unionized Sands. *Id.* Throughout the demonstration, the Venetian repeatedly played a recorded message over a public address system that referred to the demonstrators as "culinary and union workers" and claimed that they were subject to arrest

for trespassing on private property. 345 N.L.R.B. No. 82, [WL] at *7. Representatives of the Venetian asked the police to issue criminal citations to the demonstrators and to block them from the walkway. *Id.* Security guards for the Venetian also told the demonstration's leader, union agent Glen Arnodo, that he was being placed under "citizen's arrest." *Id.* The guards did not attempt to take Arnodo into custody, but the following day, representatives of the Venetian contacted the police and reported the "arrest."[2] *Id.*

Three days after the demonstration, on March 4, 1999, the Venetian filed a complaint in federal district court seeking declaratory and injunctive relief against Clark County officials, the Las Vegas Police Department, and the Union, claiming that their conduct converted the Venetian's private property into a public forum in violation of the Takings Clause of the Fifth Amendment. The district court rejected this argument holding that because the walkway performed an essential public function the Venetian could not lawfully restrict the demonstrators' exercise of their First Amendment rights. *See Venetian Casino Resort v. Local Joint Executive Bd.*, 45 F. Supp. 2d 1027 (D.

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[2] Nevada law provides for what is commonly referred to as a citizen's arrest:

> A private person may arrest another:
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> 1. For a public offense committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

NEV. REV. STAT. § 171.126.

Nev. 1999). On appeal, the Ninth Circuit affirmed. *See Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001). The Supreme Court denied the Venetian's petition for a writ of certiorari. *See Venetian Casino Resort v. Local Joint Executive Bd.*, 535 U.S. 905 (2002).

On January 23, 2003, the NLRB Regional Director issued a complaint alleging that the Venetian violated section 8(a)(1) of the Act by (1) summoning the police to cite the demonstrators for trespass and to block them from the walkway; (2) playing the trespass warning over a loudspeaker system; and (3) attempting to place union agent Arnodo under "citizen's arrest."[3] Complaint and Notice of Hearing (Jan. 23, 2003). An administrative law judge ("ALJ") tried the case on April 3, 2003 and issued a decision on June 12, 2003. The ALJ held that because the walkway was a public forum and the demonstrators were engaged in NLRA protected activity, the Venetian committed an unfair labor practice in violation of the Act when it interfered with the demonstration. *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *17. The ALJ rejected the Venetian's argument that its activities were protected by a First Amendment right to petition because it found that the Venetian's conduct was not "incidental to and inextricably intertwined with its lawsuit." 345 N.L.R.B. No. 82, [WL] at *16. On September 30, 2005,

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[3] Paragraph 5(b)3 of the January 23, 2003, complaint initially read that the Venetian, "caused to be filed a criminal trespass complaint against union agent Glen Arnodo." It was amended at the hearing before the administrative law judge to read that the Venetian, "[i]nformed union business agent Glen Arnodo that he was being placed under citizen's arrest, and the following day contacted the Las Vegas Metropolitan Police to make a report of the incident." Record of Proceedings at 167.

the Board affirmed the ALJ's decision. 345 N.L.R.B. No. 82, [WL] at *1. The Venetian filed a timely petition for review, and the Board filed a cross-application to enforce its order.

II.

We will uphold the Board's decision that the Venetian's efforts to disrupt the demonstration were unfair labor practices if the Board's factual findings are "supported by substantial evidence on the record considered as a whole," 29 U.S.C. § 160(e)-(f), and if its interpretation of the Act is "reasonable and consistent with applicable precedent," *Fashion Valley Mall, LLC v. NLRB*, 371 U.S. App. D.C. 322, 451 F.3d 241, 243 (D.C. Cir. 2006). Section 8(a)(1) of the NLRA provides that it is "an unfair labor practice . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ." 29 U.S.C. § 158(a)(1). Our analysis begins with the question whether the demonstration was protected by section 7. Affording employees their section 7 rights is "one of the fundamental purposes of the Act." *Flamingo Hilton-Laughlin v. NLRB*, 331 U.S. App. D.C. 312, (D.C. Cir. 1998). Determining what conduct falls within "the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.'" *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829, (1984) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978)).

Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157.[4] In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, (1978), the Supreme Court explained that section 7 "protect[s] concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" The Court found that the "mutual aid or protection" clause extends section 7's reach to include employee efforts to "improve terms and conditions of employment or otherwise improve their lot as employees," *id.*, but noted that the scope of the clause is not so broad as to protect a concerted activity whose relationship to "employees' interests as employees" is "so attenuated that [it] cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 568. This Court has read that limitation to require the showing of a "nexus" between the activity and "employees' interests as employees." *See Tradesmen Int'l, Inc. v. NLRB*, 348 U.S. App. D.C. 393, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (noting that "an essential element before section 7's protections attach is a nexus between one's allegedly protected activity and 'employees' interests as employees'" (quoting *Eastex*, 437 U.S. at 567)); *cf. Petrochem Insulation, Inc. v. NLRB*, 345 U.S. App. D.C. 102, 240 F.3d 26, 30 (D.C. Cir. 2001) (a union's filing of environmental

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[4] Section 7 states in full: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157.

objections to the applications for zoning and construction permits made by non-union construction companies was protected because it was an attempt to force the non-union employers to conform to area wage and benefit standards, which would benefit union members by increasing their job opportunities and improving their bargaining power for higher wages). The Venetian argues that the required "nexus" between the demonstration and "employees' interests as employees" is not present because the demonstration was not about labor practices or employment standards, but was only a challenge to the Venetian's property rights to the sidewalk. The Venetian points to press reports that described the demonstration as an attempt to "take back the sidewalk," and cites some of the demonstrators' handbilling and chants that disputed the Venetian's claim to exclusive use of the sidewalk. Petitioner's Reply Br. at 12-13.

But both the ALJ and the Board concluded that the primary focus of the demonstration was in fact, the protection of employees' rights. The Board, quoting the ALJ, reasoned as follows:

> "Having been unsuccessful at [obtaining] a 'neutrality agreement,'[5] the Union obviously decided to take its 'labor dispute' directly to prospective employees and to the general public." The "message" it sought to convey to potential

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[5] A "neutrality agreement" is an arrangement between an employer and a union whereby the "employer agrees that during a union's organizational campaign, it will remain neutral and not express opposition to its employees' selection of union representation." *In re Brylane, L.P.*, 338 N.L.R.B. 538, 540 n.4 (2002).

> employees . . . was "that the facility should be operated under a union contract and, that if hired by the [Venetian], these new employees should become union members and support the Union." The judge also found that the Union sought to convey a message to members of the general public, namely "to educate them as to the nature of the Union's dispute with the [Venetian]."

Venetian, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *1 (first alteration in original). The district court that heard the Venetian's motion to enjoin further demonstrations agreed. "On March 1, 1999, Defendants Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local No. 226, and Bartenders Union, Local No. 165 . . . staged a demonstration rally including picketing on the temporary pedestrian walkway to *protest the Venetian's employment practices*." *Venetian Casino Resort*, 45 F. Supp. 2d at 1029 (emphasis added). Many of the picket signs, the chants, and the speeches spoke of labor rights and the Union's demand that the Venetian hire union employees. Although access to the walkway was an element of the dispute and one purpose of the demonstration, we agree with the ALJ and the Board that "the central message, which members of the public received from the demonstration, was that there was a 'labor dispute' between the Union and the Venetian." *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *12.[6]

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[6] Communicating a labor grievance to the public is an effective means of inducing employer action. *See generally Local Union No. 501, Int'l Bhd. of Elec. Workers v. NLRB*, 244 U.S. App. D.C. 179, 756 F.2d 888, 894-95 (D.C. Cir. 1985) ("Both the Board and the courts have [] recognized that communicating a grievance

Because the demonstration was an effort to communicate its "labor dispute" to the public and an attempt to enlist the support of prospective employees in accomplishing its goal of getting the Venetian to "operate[] on a union basis," *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *1 n.4, we conclude that the connection between the demonstration and "employees' interests as employees" was not "so attenuated that [it] cannot fairly be deemed to come within the 'mutual aid or protection' clause" of section 7." *Eastex*, 437 U.S. at 568. In fact, the nexus was clear and distinct. With the deference we afford the Board in determining what conduct falls within the scope of section 7, we hold that it was reasonable for the Board to conclude that the demonstration was entitled to section 7 protection because it was an effort to provide for the "mutual aid or protection" of employees.

Even so, the Venetian argues, section 7 is no help to the demonstrators because its protection of union activity is "wholly derivative" of employees' rights under the statute. Because the Venetian had yet to hire employees that "the Union was interested in representing," *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *11, there was no one, the argument goes, from whom the demonstrators could derive section 7 rights.[7] Petitioner's Br. at 30. The Board, however, was

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to members of the public is an important aspect of area standards picketing.").

[7] The Venetian quotes language from *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to suggest (somewhat half-heartedly it seems) that unions do not enjoy section 7 rights. *See Lechmere*, 502 U.S. at 532 ("[T]he NLRA confers rights only on employees, not on unions or their nonemployee organizers."). (emphasis in original). We faced this argument in *Petrochem*, and found that "it would be a curious and myopic reading of the Act's core provisions to hold that, although employees are free to join unions and to

not troubled by the fact that the Venetian had not yet begun hiring employees. Neither are we. The Venetian reads the scope of section 7 too narrowly. There is nothing in the language of section 7 that limits its protection to the employees of the targeted employer. In fact, it is well established that section 7 protects employees other than those of the targeted employer. *See Int'l Alliance of Theatrical & Stage Employees v. NLRB*, 357 U.S. App. D.C. 189, 334 F.3d 27, 32 (D.C. Cir. 2003) ("The Supreme Court and this Court have, consistent with the Act's expansive definition covering '*any* employee,' broadly interpreted the term 'employee,' holding it to include individuals outside direct employment relationships, such as job applicants . . . "). Even though at the time of the demonstration the Venetian had not yet begun filling jobs the Union had targeted, it was on the verge of doing so. Record of Proceedings at 94. The resort would open for business only two months after the demonstration. *Id.* Less than one week before the demonstration, it was reported in the press that the Venetian's owner had announced that he had "put together a wage and benefit package for Venetian employees." Jeff German, Sidewalk Showdown Set, LAS VEGAS SUN, Feb. 23, 1999, at 1A. The Venetian had already begun hiring managerial, clerical, and security personnel, and would shortly begin filling the remaining jobs. Record of Proceedings at 94. The "employees" whose interests the Union was seeking to advance were the prospective employees who would be seeking those jobs, including the former

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work through unions for purposes of 'other mutual aid or protection,' the conduct of the unions they form and join for those purposes is not protected by the Act." 240 F.3d at 29 (quotation marks and citation omitted). The Venetian's argument that unions do enjoy "derivative" rights concedes as much.

Sands workers who wanted "priority hiring rights at the facility." *Venetian*, 345 N.L.R.B. No. 82, 2005 WL 2451997, at *2 n.4. Moreover, the Venetian's argument is at odds with our opinion in *Petrochem* where we found that a union was engaging in protected section 7 activity even though the company it had targeted with its concerted activity had not begun hiring for the projects on which the permits were based. 240 F.3d at 30 ("Surely nothing in the NLRA prevents unions from obtaining commitments from employers about wages and benefits for future jobs.").

For its final argument that section 7 does not protect the demonstrators, the Venetian turns again to language in *Lechmere, Inc. v. NLRB*. In *Lechmere*, the Board concluded that an employer had committed an unfair labor practice by barring union organizers from handbilling in its parking lot. 502 U.S. at 532-33. The Court reversed the Board and held that it was not an unfair labor practice for the employer to exclude nonemployee union organizers from its property "except in the rare case where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* at 537-38 (emphasis and internal quotations omitted). The Venetian reads *Lechmere* to support its argument that its efforts to deny the union demonstrators access to the sidewalk constituted a permissible exercise of its own property rights. But Venetian's argument misses a fundamental point of *Lechmere*. *Lechmere* allows an employer the right to deny access to its premises only where it has a property right to do so, and as the Ninth Circuit held, the Venetian has no property right to the sidewalk that permits it to prevent people, like the demonstrators here, from exercising their First Amendment rights by

airing to the public and to prospective employees grievances about the Venetian's employment practices. We have seen this issue before and the Board's analysis is consistent with our own. In *United Food & Commercial Workers International Union Local 400 v. NLRB*, 343 U.S. App. D.C. 93, 222 F.3d 1030 (D.C. Cir. 2000), we addressed the question whether a grocery store was permitted to exclude union organizers from sidewalks in front of its stores. We adopted the Board's reasoning in *Indio Grocery Outlet*, 323 N.L.R.B. 1138, 1141 (1997), *enforced*, 187 F.3d 1080 (9th Cir. 1999), that "for exclusion to be lawful, 'there is a threshold burden on the [employer] to establish that it had, at the time it expelled the Union representatives, an interest which entitled it to exclude individuals from the property.'" *United Food*, 222 F.3d at 1034 (quoting *Indio*, 323 N.L.R.B. at 1141) (internal quotation marks omitted and emphasis in original). In *United Food*, the employer lacked such a property right and we held that its expulsion of the union representatives from the sidewalks violated their section 7 rights. The case before us is indistinguishable. The Venetian, like the grocery store chain, lacks "the requisite property interest" that would permit it to exclude the union organizers. *United Food*, 222 F.3d at 1035.

Not surprisingly, the Venetian urges us to disregard the Ninth Circuit's holding that the Venetian lacked a property right in the sidewalk sufficient to permit it to exclude the demonstrators. Petitioner's Br. at 40. ("Venetian submits the[] decision [was] erroneous and should not be followed by this Court."). The doctrine of issue preclusion prevents us from doing so. *See Consol. Edison Co. of N.Y. v. Bodman*, 371 U.S. App. D.C. 236, 449 F.3d 1254, 1257-58 (D.C. Cir. 2006) ("Under the doctrine of issue preclusion, binding effect is to be

given to the first resolution of an issue.") (internal quotation marks, alteration and citation omitted). In *Beverly Health & Rehab. Servs. v. NLRB*, 354 U.S. App. D.C. 414, 317 F.3d 316, 322-23 (D.C. Cir. 2003), we denied a similar request to disregard a sister circuit's decision and outlined the familiar and long-settled standards for determining the preclusive effect of an earlier holding:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case . . . . Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination. An example of such unfairness would be when the losing party clearly lacked any incentive to litigate the point in the first trial, but the stakes of the second trial are of a vastly greater magnitude.

Id. (citation and quotation omitted). All three requirements are fully met here. The Ninth Circuit considered the very argument the Venetian urges us to reconsider here, and clearly and conclusively rejected it. *See Venetian Casino*, 257 F.3d at 948. We can find no basis to conclude that there would be any unfairness to the Venetian in applying the determination of the Ninth Circuit. We can discern no difference between the incentives that the Venetian may have had in its Ninth Circuit litigation and its incentives here. The stakes in its attempt before that court were no less than they are now.

The foregoing discussion showing that the demonstrators were protected by section 7 serves as a

lengthy prelude to the central question of this appeal, which can now be phrased easily and answered succinctly. Did the Venetian interfere with the demonstrators' section 7 rights? Yes. "An employer's statement violates the NLRA if, considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with [section 7] rights." *Tasty Baking Co. v. NLRB*, 349 U.S. App. D.C. 37, 254 F.3d 114, 124 (D.C. Cir. 2001). We afford the Board deference in making this determination "recogniz[ing] the Board's competence in the first instance to judge the impact of utterances." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). It is not difficult for us to conclude that the Board reasonably held that the Venetian's efforts to disrupt the demonstration were attempts to "interfere with [or] restrain" the demonstrators' "exercise" of their section 7 rights. Playing the trespass warning message and telling union agent Arnodo that he was under "citizen's arrest" each "had a reasonable tendency to . . . interfere" with the demonstration. Unfair labor practices have been found in similar efforts. *See United Food*, 222 F.3d at 1039 (grocery store's policy barring solicitation on sidewalks in which it lacked a sufficient property interest to do so violated the Act); *NLRB v. Calkins*, 187 F.3d 1080, 1083 (9th Cir. 1999) (threats to have nonemployee put under "citizen's arrest" for handbilling and picketing violated section 8(a)(1)); *Wild Oats Markets, Inc.*, 336 N.L.R.B. 179, 181 (2001) ("It is beyond cavil that had the Respondent directly ordered the union representatives to cease picketing and vacate the premises . . . the Respondent would have engaged in unlawful interference with Section 7 rights."); *D'Alessandro's, Inc.*, 292 N.L.R.B. 81 (1988) (employer violated section 8(a)(1) by threatening arrest and posting a sign on its premises disallowing pickets).

We decline, however, to decide whether the Venetian's summoning of the police violated section 8(a)(1). As we discuss next, the Venetian has argued that summoning the police was directly petitioning government and therefore protected activity. Because the Board did not address this argument, we cannot conclude that it was a violation of section 8(a)(1) without knowing the Board's reasoning.

Finally, we turn to the Venetian's argument that the Supreme Court's *Noerr-Pennington* doctrine should be extended to create a safe harbor for its actions. The doctrine provides that in certain contexts otherwise illegal conduct--such as concerted activity among business competitors--is protected by the First Amendment when it is part of a direct petition to government or "incidental" to a direct petition. The Supreme Court created the doctrine in the context of antitrust law. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961), the Supreme Court held that collaboration among railroad companies lobbying for legislation that would limit competition in the trucking industry did not violate antitrust laws because it was part of an exercise of their First Amendment right to petition the government. In *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70 (1965), the Court held that the First Amendment protected mine operators and workers from antitrust laws when they collaborated to petition the Tennessee Valley Authority to increase minimum wages. The First Amendment protection was not diminished in that case, even though the mine operators' purpose was to reduce competition by forcing smaller competitors out of business because they could not afford to pay higher wages. The *Noerr-Pennington* doctrine has since been

used to "insulate[] from antitrust challenge competitors' decision to combine to petition the government, even if their underlying intention is to restrain competition or gain advantage over competitors." *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 347 U.S. App. D.C. 178, 256 F.3d 799, 817 (D.C. Cir. 2001).

Central to the Venetian's argument here is the fact that the Court has not limited *Noerr-Pennington* immunity to the direct petitioning of government. Included within its ambit is conduct "'incidental' to a valid effort to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 143). *Noerr* itself immunized from Sherman Act liability activity that was not direct government petitioning. The protected activity in *Noerr* was the railroad industry's "publicity campaign" against the trucking industry that included "[c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda and . . . other documents." *Noerr*, 365 U.S. at 142.

Recognizing the importance of identifying articulable limits on the reach of the immunity created by *Noerr-Pennington*, the Court in *Allied Tube* attempted to explain the scope of protected "incidental" activity. *Allied Tube* involved the efforts of the Nation's largest steel electrical conduit manufacturer to influence a decision of the National Fire Protection Association ("NFPA"), a private, voluntary organization that promulgates the National Electric Code, which is routinely adopted by "[a] substantial number of state and local governments . . . with little or no change," *Allied Tube*, 486 U.S. at 495. The steel conduit manufacturer recruited individuals to join the NFPA who would vote against a competitor's proposal

to amend the code. The proposal was rejected, and the competitor brought suit alleging violation of the Sherman Act. *Id.* at 497. The steel conduit manufacturer defended by arguing that "because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the [NFPA's] standard-setting process" were "incidental" to direct petitions of state and local governments. *Id.* at 502. In rejecting the steel conduit manufacturer's "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action," *id.* at 503, the Court explained that "incidental" activity is not protected by *Noerr-Pennington* if its "context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.* at 505. The Court found that given the "context and nature" of the steel conduit manufacturer's activity, it was "more aptly [] characterized as commercial activity with a political impact" that resembled conduct "normally held violative of the Sherman Act," and was therefore not entitled to *Noerr-Pennington* immunity. *Id.* at 507.

The Venetian urges us to extend *Noerr-Pennington's* protection of "incidental" conduct to what it describes as its "pre-litigation activities," *i.e.*, broadcasting the trespass message and attempting to make the "citizen's arrest."[8] It argues that this conduct was "incidental to and inextricably intertwined" with its lawsuit, which was, without question, a valid government petition. *See Cal. Motor Transp. Co. v.*

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[8] The Venetian argues that its summoning of the police was direct petitioning activity.

Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). In this respect, the Venetian asks us to follow the example of the Ninth Circuit, which recently applied *Noerr-Pennington's* protection of "incidental" activity to shield a company's pre-litigation settlement demand letters from RICO liability. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). The Supreme Court has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning, *i.e.*, employer lawsuits, *see Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); it has yet to do so in labor law for "incidental" conduct. We do not decide this question, however, because of the Venetian's inability to show that its conduct was in fact "incidental" to its lawsuit under the holding of *Allied Tube*.

To determine whether the Venetian's pre-litigation activities are protected as "incidental" conduct, we look to the "context and nature of [the] activity" to determine whether it is the type of activity "that has traditionally had its validity determined by the [NLRA itself]." *Allied Tube*, 486 U.S. at 505. The proper inquiry is whether the conduct can be characterized as typical "pre-litigation" activity, or is "more aptly [] characterized as [NLRA] activity" that happens to have an impact on litigation. *Id.* at 507. So stated, this is not a close call. The Venetian claims that its actions were "necessary prerequisite[s] to establishing the elements for injunctive relief," but cites to no case or statute that supports that contention. At oral argument, the Venetian's counsel made the claim that under the Nevada trespass statute, the property owner must give notice to the trespasser in order to establish a trespass

claim. Although that may be true, it is irrelevant to this case because the Venetian never filed a trespass lawsuit. Its lawsuit sought an injunction and declaratory judgment--forward-looking relief. There is no evidence that this conduct is customary "pre-litigation" activity. However, this type of conduct has long been held to be governed by the NLRA. The "context and nature" of the Venetian's conduct shares more with the line of section 7 cases we have cited, *see* cases cited *supra* p. 16, than it does with "pre-litigation" activity. It is worth noting what the Venetian asks us to do by expanding the scope of *Noerr-Pennington* immunity in labor law. Unlike many other contexts, expanding First Amendment protection in labor law for an employer's arguably expressive conduct may result in constricting the scope of employees' expressive activity protected by section 7. That is one reason why, as *Allied Tube* is so careful to point out, context matters when a party urges the expansion of *Noerr-Pennington*. *See Allied Tube*, 486 U.S. at 503-04 (citing a long list of prohibited antitrust conduct that would be protected if the Court accepted "petitioner's absolutist position that the Noerr doctrine immunizes every concerted effort that is genuinely intended to influence governmental action"). Were we to interpret *Noerr-Pennington* to protect an employer's conduct that has as little connection to actual petitioning activity as the Venetian's, we would effectively eviscerate the fundamental protection section 7 seeks to provide for expressive activities by labor unions.

The Venetian's reliance on the Ninth Circuit's opinion in *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006), is unavailing. The *Sosa* court held that a satellite television company was immune from liability

under RICO for sending letters to individuals who had improperly tapped into its satellite signal. The letters demanded payment and threatened litigation in response to noncompliance. The court held this to be pre-litigation activity within the scope of the protection afforded by the *Noerr-Pennington* doctrine. 437 F.3d at 942. The Ninth Circuit had held that "in the litigation context, not only petitions sent directly to the court in the course of litigation, but also 'conduct incidental to the prosecution of the suit' is protected by the *Noerr-Pennington* doctrine," *id.* at 934 (quoting *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir. 1991)). That principle, however, had been limited specifically to antitrust cases, *id.* at 937, and protected "incidental" conduct only "so long as [it was] sufficiently related to petitioning activity," *id.* at 935. In extending the doctrine to protect pre-litigation activities outside of the antitrust context, the Sosa court closely examined the relation between the "incidental" action--the demand letters--and the lawsuit, which was a lawful direct petition to the government. It determined that "the connection between presuit demand letters and access to the courts is sufficiently close" to apply *Noerr-Pennington* immunity. *Id.* at 936.

But *Sosa* is of no help to the Venetian. The holding there was limited to a narrow category of "incidental" activity: "[p]relitigation communication[] demanding settlement," that the court found had a "sufficiently close" connection to the lawsuit. *Id.* The *Sosa* court cited several reasons in support of this determination. The first two are telling. "First, preceding the formal filing of litigation with an invitation to engage in negotiations to settle legal claims is a common, if not universal, feature of modern litigation . . . . Second,

many states, including California, protect prelitigation communications under statutorily granted litigation privileges." *Id.* By contrast, broadcasting the trespass warning message and making the "citizen's arrest" have nothing at all to do with the right to "access [] the courts." They are neither common features of litigation nor statutorily protected litigation privileges. Even were we to adopt the reasoning of the *Sosa* court as the Venetian urges, its argument would still fail because it cannot show that its "pre-litigation" activities are "sufficiently close" to its lawsuit.

Of the three activities the Board determined were unfair labor practices--summoning the police, broadcasting the trespass message, and attempting to effect a "citizen's arrest"--we conclude that broadcasting the trespass warning message and trying to effect the "citizen's arrest" are not protected by the *Noerr-Pennington* doctrine. Venetian has failed to show that these activities were in any sense prerequisites to its lawsuit. Regarding the summoning of the police, the Venetian argues that was a direct effort to "influence . . . law enforcement practices," Petitioner's Br. at 24 (quoting *Noerr*, 365 U.S. at 144), and is therefore protected activity under the First Amendment. Because the Board did not address this argument in reaching its conclusion, we remand that issue for the Board's consideration.

III.

We deny the Venetian's petition for review and grant the Board's cross-application to enforce its order in all respects except on the issue whether summoning the police was protected by the *Noerr-Pennington* doctrine. We remand that issue to the Board.

So ordered.

APPENDIX B

Venetian Casino Resort, LLC *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union. [1] Case 28–CA–16000

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 12, 2003, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.[2]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent

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[1] We have amended the caption to reflect the disaffiliation of the Hotel Employees and Restaurant Employees International Union from the AFL-CIO effective September 14, 2005.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have

consistent with this Decision and Order and to adopt the recommended Order as modified.

At issue in this case are the Respondent's actions on March 1, 1999, when, in response to a union demonstration on the sidewalk in front of the Respondent's hotel and casino, then under construction, the Respondent summoned the local police, placed a union official under "citizen's arrest," and took other actions to interfere with the demonstration. At the time, the Respondent and the Union disputed the legal status of the sidewalk: the Respondent contended that it was private property, while the Union and its supporters contended that it was public. In non-Board litigation commenced by the Respondent after the demonstration, the courts determined that "the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment." *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937, 948 (9th Cir. 2001), cert. denied 535 U.S. 905 (2002).

The administrative law judge found that, because the sidewalk was a public forum and the union demonstrators were involved in protected activity, the Respondent's actions in response violated Section 8(a)(1) of the Act. We agree.

The judge stated: "Having been unsuccessful at [obtaining] a 'neutrality agreement,' the Union obviously decided to take its 'labor dispute' directly to prospective employees and to the general public." The "message" it sought to convey to potential employees, the judge found, was "that the facility should be

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carefully examined the record and find no basis for reversing the findings.

operated under a union contract and, that if hired by the Respondent, these new employees should become union members and support the Union." The judge also found that the Union sought to convey a message to members of the general public, namely "to educate them as to the nature of the Union's dispute with the Respondent."[4] We affirm those factual findings, and the judge's conclusion that the Union's attempt to convey those messages was protected by Section 7.[5] Accordingly, we agree with his ultimate finding that the Respondent's efforts to interfere with the Union's conduct that day violated Section 8(a)(1) of the Act.[6]

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[4] The judge observed that the Union's message vis-à-vis members of the general public was "analogous to 'area standards' activity." We also note that the record reflects that the demonstrators carried signs reading "Union Rights;" chanted slogans such as "Venetian no, Union yes" and "Hey, hey, ho, ho, union busting's got to go;" and speakers at the demonstration complained that the Venetian should be operated on a union basis and that former Sands employees were not offered priority hiring rights at the facility.

[5] We therefore need not rely on the judge's implicit factual finding that a purpose of the Union's demonstration was to persuade the Respondent to enter into a neutrality agreement or his statement that "an effort to obtain a 'neutrality agreement'. . . would constitute union activity in the most basic sense." However, assuming arguendo that the demonstration had that purpose, the Respondent does not argue that such a purpose is not protected by the Act.

[6] Member Schaumber agrees with his colleagues that the picketing in this case was protected union activity, and that the Respondent violated Sec. 8(a)(1) by interfering with that activity. He agrees with Chairman Battista that serious legal issues warranting careful consideration are presented when a union engages in picketing to obtain a neutrality/card check agreement. Because the Respondent has not presented these issues to the Board, he finds it unnecessary to reach them in deciding this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"The Respondent, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from"

2. Substitute the following for paragraph 2.

"2. Take the following affirmative action necessary to effectuate the policies of the Act."

Dated, Washington, D.C. September 30, 2005

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring.

I join in the decision that the picketing was protected, and that the Respondent interfered with that activity. However, I note that the union agent testified that the picketing was to obtain a

neutrality/card check agreement. The judge found that the picketing was for that object, and he reached the legal conclusion that picketing for that object is protected activity.

I join my colleagues in their nonreliance on the factual finding, and I have grave doubts about the correctness of the legal conclusion. Where, as here, the employer has not hired any employees, it may well be that a neutrality/card check agreement would be unlawful, and/or that picketing for such an agreement is unprotected.

However, the Respondent does not defend on that basis. Indeed, it argues that this was not the object of the picketing. The Respondent defends on the basis that the sidewalk was its private property. My colleagues correctly reject that defense.

Thus, the picketing was unquestionably union activity. The element that might remove this activity from the protection of the Act (see above) is not being relied upon by the Respondent. In these circumstances, I agree that the interference with the activity violated Section 8(a)(1).

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

Richard A. Smith, Esq., for the General Counsel.

Richard S. Rosenberg, Esq., of Universal City, California, for the Respondent.

DECISION

Statement of the Case

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, on April 3, 2003. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union or the Charging Party) filed an unfair labor practice charge in this case on August 26, 1999. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on January 23, 2003.[1] The complaint alleges that Venetian Casino Resort, LLC (the Respondent, the Venetian, or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following

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[1] A complaint in this case originally issued on November 30, 1999. On January 7, 2003, the Acting Regional Director approved an informal settlement agreement between the parties in this matter. However, subsequently, the Regional Director determined that the terms of the settlement agreement were not being complied with, and issued an order setting aside the settlement agreement. The complaint currently before me was then issued.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Nevada limited liability company, with an office and place of business in Las Vegas, Nevada (the facility), where it has been engaged in the operation of a hotel and casino. Further, I find that during the period from on or about May 4 through August 26, 1999, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the same period of time, the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Nevada.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The Dispute

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consideration given for reasonable probability and the demeanor of the witnesses. *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

The complaint alleges that on March 1, 1999,[3] on the sidewalk along the front of the Respondent's facility, the Union conducted a demonstration against the Respondent. At the time, the Respondent's hotel and casino were under construction. Further, the complaint alleges that the Respondent's security guards[4] summoned the Las Vegas Metropolitan Police and requested that demonstrators be issued citations and excluded from the sidewalk in front of the Respondent's facility. It is also alleged that the security guards caused the recording of a trespass message and the playing of the message over a loudspeaker during the demonstration. Additionally, the complaint alleges that during the same demonstration the security guards informed union business agent Glen Arnodo that he was being placed under citizen's arrest, and the following day contacted the police to make a report of the incident.[5] It is the contention of the General Counsel that this conduct on the part of the Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act.

The Respondent acknowledges the actions of its security guards as alleged in the complaint. However, it denies that these actions in any way interfered with, restrained, or coerced employees in the exercise of

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[3] All dates are in 1999 unless otherwise indicated.

[4] The parties stipulated that for purposes of the complaint allegations, the security guards described in the complaint were acting at the behest of the Respondent and, therefore, were agents of the Respondent within the meaning of Sec. 2(13) of the Act. (Jt. Exh. 1.)

[5] This allegation in par. 5(b)(3) of the complaint appears as amended by counsel for the General Counsel at the hearing.

Section 7 rights. The Respondent denies the commission of any unfair labor practices. It contends that its actions of March 1, 1999, and thereafter were a lawful exercise of its private property rights under the Fifth Amendment to the Constitution of the United States.

For the most part, the facts in this case are not in dispute.[6] What remains in dispute, however, is a legal issue. That issue is whether the Respondent's efforts to remove demonstrators, who were allegedly engaged in union organized expressive activity, from the sidewalk along the front of the Respondent's facility constituted a violation of Section 8(a)(1) of the Act.

B. The Facts

The Venetian Casino Resort is a luxury hotel-casino located in Las Vegas, Nevada, on Las Vegas Boulevard, a State highway commonly known as the "Las Vegas Strip." The Respondent's facility opened to the public during May 1999. Previously, the property on which the facility now sits had been occupied by another hotel-casino. The Respondent obtained approval to demolish the hotel-casino formerly occupying the property and to construct a new hotel-casino. In February 1997, prior to the Respondent beginning construction on the facility, it entered into a "pre-development agreement" with Clark County, Nevada. Apparently, as part of that agreement, the Respondent agreed to abide by the results of a county-approved

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[6] In its answer, the Respondent denies the allegation in the complaint regarding the filing and service of the charge. However, the filing and service of the charge as alleged is established by the unrebutted admission into evidence of the original charge, docket letter, and affidavit of service for this case. See GC Exhs. 1(a) and (b).

study assessing the effect of the new construction on vehicular and pedestrian traffic.

The traffic study was completed in September 1997, and it recommended widening Las Vegas Boulevard by one lane along the front of the Respondent's property. The additional traffic lane would displace what had been a public sidewalk, on State property, running alongside Las Vegas Boulevard. The widening of the roadway would encompass the full State right-of-way on Las Vegas Boulevard, leaving no remaining State property for a new public sidewalk. The county approved the traffic study[7] and agreed with the Respondent that it would be necessary for the Respondent to meet with the Nevada Department of Transportation (NDOT) to address the matter of pedestrian passage along the front of the Respondent's property on Las Vegas Boulevard, and access to the property.

The Respondent entered into negotiations with the NDOT, which culminated in an agreement on January 8, 1999. (Jt. Exh. 3, "Agreement" attachment.) The agreement requires the Respondent to "construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property." Under the terms of the agreement, it appears that the parties have specifically refrained from requiring the

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[7] Apparently, the county approved the traffic study after a public hearing during which a number of county commissioners raised questions about whether the public would have the right to engage in expressive activity on any sidewalk constructed in front of the Respondent's facility. While it is somewhat unclear, it appears that there was no definitive answer given the commissioners, and no further action taken by the county regarding this issue.

Respondent to dedicate a public right-of-way to the State for a new public sidewalk. To the contrary, every reference in the agreement to sidewalk explicitly affirms that it is "private." The agreement states that the Respondent "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments." Further, it emphasizes that the State "is not taking any private property interest with this document."

The private nature of the sidewalk is also reflected in several other clauses in the agreement. For example, the Respondent is required to "keep and maintain, at its sole expense, the private sidewalk free of all weeds, noxious plants . . . and at all times in an orderly, clean, safe, and sanitary condition." Further, the Respondent is required to "absolve, indemnify, and defend" the State "from any and all cost, expense, or liability arising from the . . . use of the private sidewalk." The agreement offers only one potential future scenario under which the Respondent might be required to relinquish its property rights and to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk. That situation would arise only if the "private sidewalk" were to be "removed, altered, or abandoned."

It is clear to me from a reading of the agreement that by its terms the parties intended for the Respondent to construct a sidewalk on its private property that would remain the private property of the Respondent, but upon which the public would have access. This would allow the public to walk along the continuous sidewalks in front of the various hotel-casinos along Las Vegas Boulevard, including the Respondent's facility. It would also provide the public with access to the Respondent's facility. In my opinion,

the agreement intended that this be done without requiring the Respondent to explicitly dedicate a public right-of-way for a new public sidewalk.

Subsequently, construction began on the Respondent's facility. As part of that process, the Respondent demolished the public sidewalk that had existed along Las Vegas Boulevard. This enabled the construction of the new lane of traffic as had been provided for in the previously agreed upon traffic study. During the construction of the new hotel-casino, the Respondent had a temporary private walkway built within its private property in the area where the private sidewalk required by the agreement with the NDOT would ultimately be constructed.

In February 1999, the Respondent became aware that the Union intended to hold a demonstration at the facility to protest the Respondent's labor policies.[8] David Friedman, assistant to the chairman of the Venetian, testified that he obtained this information from a number of different sources, including various newspaper articles. (R. Exh. 6–9.) In anticipation of demonstrators entering its private property, the Respondent surveyed its property lines and had the dividing line between the State property (Las Vegas Boulevard) and the Respondent's private property marked with an orange paint. Further, the Respondent

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[8] According to the testimony of Glen Arnodo, the Union's political director, the Union intended to picket the Respondent's construction site because the Respondent had declined to enter into a "neutrality agreement" with the Union providing for a "card check" to determine whether a majority of the employees of the hotel-casino desired union representation. However, it should be noted that at the time of the events in question, apparently the only employees of the Respondent working on the construction site were managers and security personnel.

had signs posted designating the temporary private walkway along the front of its facility as private property.

The demonstration occurred on March 1, 1999, at a time when the facility was still an active construction site. There were in excess of 1000 persons who participated in the demonstration, which was conducted over several hours in the late afternoon and early evening.

The demonstrators carried picket signs, chanted slogans, and walked in a loop back and forth along Las Vegas Boulevard.[9] Certain of the demonstrators wore T-shirts, buttons or carried picket signs that designated the names of various unions, including the Charging Party. For much of the march the demonstrators were clearly walking on the temporary private walkway on the Respondent's property. (R. Exhs. 1 and 5.) Many of the picket signs contained a picture of the Respondent's chairman under the words "PRIVATE SIDEWALK." At the top and bottom of the signs were the words "UNION RIGHTS/ CIVIL RIGHTS/ ONE AND THE SAME." (Jt. Exh. 4.) The chants included the repetitive use of the word "Union," and "USA," and the words, "Who owns the sidewalk? We own the sidewalk," and "Who owns the sidewalk? Union sidewalk." (R. Exh. 5.) Additional chants included, "Venetian no, Union yes," and "Hey, hey, ho, ho, Union bustings got to go." (Jt. Exh. 5.) Toward the end of the demonstration, there were also speeches

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[9] The Respondent had a significant portion of the demonstration videotaped. Introduced into evidence as Jt. Exh. 5 was an approximately 30-minute long tape of certain portions of the demonstration. Introduced as R. Exh. 5 was a shorter version, approximately 7 minutes long.

given by a number of individuals. One unidentified speaker is heard to remark to a group of demonstrators that the Venetian should be operating the property "one hundred percent Union." (Jt. Exh. 5.) Another unidentified speaker complains to the assembled demonstrators that former employees of the Sands Hotel and Casino (the previous occupant of the property) were not being given any greater right than the general public to apply for jobs at the Venetian. Further, this speaker says that although the property has a "new name," it "should still be Union." (Jt. Exh. 5.)

The county had previously granted the Union a permit allowing it to conduct the demonstration on March 1, 1999, on the "sidewalk in front of the Venetian hotel and casino and one north bound travel lane adjacent to sidewalk." (Jt. Exh. 3, "Application and Permit" attachment.) Further, both the Metropolitan Police Department and the district attorney, upon inquiry from the Respondent, had advised the Respondent that in their view demonstrators on the temporary private walkway would not be trespassing, as the walkway, although private property, constituted a public forum pursuant to the First Amendment to the Constitution of the United States.

Of course, the Respondent viewed the situation differently. As the demonstration commenced and the protesters began to walk along the temporary private walkway on its property, the Respondent had its security guards repeatedly play over loudspeakers a recorded message advising the demonstrators that they were trespassing on private property, were subject to arrest, and citing to them a Nevada State statute. The recording addressed the demonstrators as "culinary

and union workers." (R. Exh. 5.) Additionally, the Respondent admits that it requested that the police issue citations to the demonstrators and exclude them from the temporary private walkway in front of the facility. Also, the Respondent admits that one of its security guards informed Glen Arnodo, union political director, that he was being placed under citizen's arrest for trespassing, and the following day agents of the Respondent contacted the police to make a report of the incident. (GC Exh. 2.)

Following the demonstration, the Respondent filed an action in the U.S. District Court seeking declaratory relief against the Government officials and the Union, alleging that their conduct had the effect of converting the Respondent's private property into a public forum, and thus amounted to a taking of its property in violation of the due process clause of the United States Constitution. The Respondent also filed a motion for a preliminary injunction against the Government officials, seeking to bar them from authorizing demonstrations on its property and from refusing to enforce its private property rights.

The District Court in *Venetian Casino Resort v. Local Joint Executive Board,* 45 F.Supp. 2d 1027 (D.Nev. 1999), framed the issue before it as having "to consider whether a pedestrian walkway, located on private property parallel and adjacent to the Las Vegas Strip and connected at both ends to public sidewalks, is a public forum for First Amendment purposes." The court acknowledged a "general rule" that the Constitution does not apply to private conduct, citing *Hudgens v. NLRB,* 424 U.S. 507, 513 (1976). However, the court also noted that "[s]idewalks have traditionally been recognized as the quintessential public forum."

Further, the district court noted that "private property rights are very important and should not be disregarded simply because a private owner performs a function that is sometimes performed by the government." Even so, citing *Marsh v. Alabama*, 326 U.S. 501 (1946), the court declared that "if ever there was a case where the protections of the First Amendment to the United States Constitution should be applied to private property used for a particular public function, this is the case." The court noted that city sidewalks that run parallel to public streets and which allow members of the public to move around the city have traditionally been exclusively owned and maintained by the Government. Therefore, according to the court, by owning and maintaining the sidewalk in question, the Venetian was performing a public function.

In its holding, the court concluded that while the sidewalk in question is the Venetian's private property, as a "thoroughfare" along a public street, it "serves the needs of the general public." As the sidewalk serves what is basically a public function, "the Venetian does not have the right to exclude individuals from the sidewalk based upon permissible exercises of their right to expression under the First Amendment." Further, the court held that "[t]he public may use the Venetian's sidewalk for First Amendment purposes to the same degree that it may use any other public sidewalk subject to content neutral and reasonable time, place, and manner restrictions." As a result, the court denied the Venetian's motion for temporary restraining order and preliminary injunction. In related matters, the court granted the Union's expedited motion for summary judgment, and also entered judgment dismissing the Venetian's claims

against the Union, Clark County,[10] and the Las Vegas Metropolitan Police Department. Finally, the court entered judgment on behalf of the American Civil Liberties Union of Nevada (ACLU), intervenor, granting its claim for a declaratory judgment that the sidewalk on the Venetian's property abutting Las Vegas Boulevard "is a public forum." (Jt. Exh. 2, apps. B, C, and D.)

While this matter was pending in district court, the Respondent completed construction of its hotel-casino. According to the testimony of David Friedman, the competed facility contains a large plaza area extending from the hotel frontage to Las Vegas Boulevard, with the private sidewalk, as set forth in the 1999 Agreement with the NDOT, constituting the border of the plaza adjacent to the street. The entire plaza area, including the sidewalk in question, is composed of distinctively colored and patterned tiles. It is these tiles that visibly differentiate the sidewalk in front of the Respondent's facility from the adjoining public sidewalks on either side of the Respondent's property. (Also, see R. Exh. 4.)

On appeal from the District Court, a panel of the Ninth Circuit affirmed.[11] See *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937 (9th Cir. 2001), rehearing and rehearing en banc denied. The court framed the issue before it as "whether the sidewalk on private property that requires unobstructed pedestrian traffic is a public forum." The court noted that the Venetian's sidewalk was a

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[10] Stewart L. Bell, Clark County District Attorney, was also a named defendant against whom the Venetian's claim was dismissed.

[11] One judge dissented from the two judge majority opinion.

"thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use." Citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988), the court indicated that historically public streets and sidewalks have been used for public assembly and debate. They constituted the "archetype of a traditional public forum." (Internal quotation marks omitted.) Noting it was uncontested that the public sidewalk, which previously existing in front of the Venetian, was a public forum, the court concluded that while title to the property upon which the replacement sidewalk stood was held by the Venetian, the agreement with the NDOT had created "a servitude imposed for unobstructed public use of the sidewalk." Therefore, according to the court, "for purposes of public use it was a public sidewalk with the normal attributes of a public sidewalk."

The Circuit Court found that the sidewalk in question "is the only means for pedestrians to travel north or south along the Venetian's side of Las Vegas Boulevard, a busy multi-lane traffic artery." Apparently, the court did not view the difference in paving material between the Venetian sidewalk and adjoining sidewalks as significant, since it found "little to distinguish" the sidewalks from each other. Also, the court did not seem impressed with the Respondent's argument that the particular parcel of land used for the sidewalk in question had never been a public sidewalk or forum, finding that what is significant "is the historical use of the sidewalk adjacent to Las Vegas Boulevard . . . not the piece of land on which the replacement sidewalk had to be located." It was, therefore, significant to the court that the sidewalk in front of the Venetian's predecessor was publicly owned and "historically ha[d] been a public forum."

According to the Circuit Court, pedestrians walking up and down the Las Vegas Strip would have no way to determine that the sidewalk in front of the Venetian "enjoys a different legal status than the public sidewalks to which it is seamlessly connected to the north and south." In these circumstances, members of the public had the right to pass across the Venetian property along Las Vegas Boulevard and "to express themselves as they do so with the same freedom as on any public sidewalk."

The court rejected the Venetian's argument that it had not dedicated the sidewalk in question to public use, nor conveyed any property interest to the county or State. Reviewing the 1999 Agreement between the Venetian and the NDOT, the court concluded that its "provisions constituted a dedication of the sidewalk to public use." The provisions of the agreement require the Venetian "to provide a sidewalk for general public use, and they deprive the Venetian of its private property right to block or otherwise impede public access to the sidewalk." In the view of the court, the agreement resulted in the State possessing a property interest in the sidewalk, the purpose of which was "to guarantee unrestricted public passage along Las Vegas Boulevard." On the other hand, "the Venetian retains a property interest other than that dedicated to the public" by the agreement.

The court emphasized that the sidewalk in front of the Venetian possesses "all the attributes of a public forum." In view of the historical public character of the predecessor sidewalk, the replacement sidewalk's current public use, its interconnection with the network of public sidewalks, and its dedication to public use, the court concluded that the sidewalk in question "constitutes a public forum subject to the

protections of the First Amendment." Accordingly, the Court of Appeals affirmed the judgment of the District Court.

Thereafter, the Respondent filed a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit. The U.S. Supreme Court denied that petition. *Venetian Casino Resort v. Local Joint Executive Board*, mem. 535 U.S. 905 (2002).

C. Argument and Analysis

1. The Venetian's sidewalk is a public forum

In his post-hearing brief, counsel for the Respondent continues to argue that the sidewalk in the front of the Respondent's facility is "private property" and, therefore, it was within the Respondent's property right to exclude the union demonstrators from the sidewalk. Of course, counsel acknowledges the decisions of the District Court and Ninth Circuit, but "respectfully submits that those decisions were in error and should not be followed." While the Respondent has certainly remained consistent in its position, there is no longer any doubt that this issue has now been decided. Although their analysis was somewhat different, both the District Court and Ninth Circuit held that the sidewalk in question was a "public forum" for purposes of First Amendment expressive activity. This issue having been conclusively decided by the Federal Courts, no useful purpose will be served by discussing it further.

2. The union demonstrators were engaged in protected activity

It is the position of the Respondent that the activities of the union demonstrators on March 1 "fell

outside the scope of Section 7," and, thus, were not protected so as to prohibit employer interference, restraint or coercion under Section 8(a)(1) of the Act. The Respondent argues that the subject matter of the demonstration did not fall within the scope of activities typically covered by Section 7. The Respondent contends that the stated purpose of the demonstration was to "take back the sidewalk," which was unrelated to traditional union activity. Further, it is the position of the Respondent that as at the time of the demonstration the Venetian had no employees the Union was interesting in representing, the Union's action could not have been related to the Respondent's labor practices, employment standards, or otherwise related to employee interests.

The facts do not support the Respondent's contention. As noted earlier, Glen Arnodo, union political director, testified that the reason the Union was picketing the Venetian was because the Respondent had not agreed to a "neutrality agreement," which would provide for a card check of majority status prior to the opening of the facility. While David Friedman, assistant to the chairman of the Venetian, testified that no neutrality proposal was ever made directly to him by the Union, he acknowledged that he "had heard" about the Union seeking such an agreement with the Venetian prior to the opening of the hotel-casino. Certainly, picketing the facility in an effort to obtain a "neutrality agreement" from the Employer would constitute union activity in the most basic sense. The fact that the Venetian had at the time of the picketing no employees the Union was interested in representing is really not relevant, as it was obvious that the hotel-casino was within several months of opening, at which time it would be filled

with the type of employees that the Union had traditionally represented.

Further, the actions of the demonstrators on March 1 establish beyond any doubt that they believed the Union had a "labor dispute" with the Respondent, and wanted others, including potential employees and the general public, to be aware of the nature of that dispute. The videotapes of the demonstration establish conclusively that the union demonstrators intended principally[12] for prospective employees of the Venetian and the general public to know they had a labor dispute with the Respondent. The demonstrators carried picket signs, a tradition symbol of worker protest, with the words "Union Rights" on the signs, as well as other slogans. Their chants included the repetitive use of the words "Union" and "Union sidewalk," and the refrains of "Venetian no, Union yes" and "Hey, hey, ho, ho, Union bustings got to go." Also, speakers at the demonstration who addressed their comments to assembled groups of people spoke about operating the hotel-casino "one hundred percent Union," and being able to apply for jobs at the facility, which the speaker indicated should be operated "Union." (R. Exh. 5 and Jt. Exh. 5.)

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[12] The union demonstrators also intended to publicize the Respondent's alleged improper attempt to control the sidewalk in front of the facility. The demonstration was characterized in part as an effort to "take back the sidewalk," and similar picket signs, slogans and chants were used at the rally. Certainly, this characterization attracted a wider audience, including the ACLU. However, this does not detract from what was the Union's principal intent in organizing the demonstration. In my view, that was certainly the Union's interest in advertising its labor dispute with the Respondent.

The message being addressed to prospective employees by the union demonstrators was obvious, that being that the facility should be operated under a union contract and, that if hired by the Respondent, these new employees should become union members and support the Union. It is axiomatic that such an effort on the part of the demonstrators constituted the most basic form of union activity under Section 7 of the Act, as "concerted activities for the purpose of . . . mutual aid or protection." Having been unsuccessful at arranging for a card check of majority status through a "neutrality agreement," the Union obviously decided to take its "labor dispute" directly to prospective employees and to the general public.

Regarding its appeal to the general public, the intent was clearly to educate them as to the nature of the Union's dispute with the Respondent. Of course, the implied threat to the Respondent was that if the public was in sympathy with the Union in its labor dispute with the Respondent, members of the public might not be willing to patronize the Respondent's hotel-casino. In this respect, the Union's actions were analogous to "area standards" activity.

In *Great American*, 322 NLRB 17 (1996), the Board reiterated that area standards and customer boycott handbilling are normally protected by Section 7 of the Act. The Board indicated that it "normally does not look beyond the communication the union is conveying to consumers." Further, the Board held that the burden is on the employer "to establish if it can, that the union's activity is not what it appears to be and that it is outside the sphere of Section 7 protection." In the matter before me, the union demonstrators' message to the public was clear, namely that there was a labor dispute with the Venetian. That message was conveyed

to the public through the Union's use of picket signs, chants, and speeches, which mentioned "union rights," operating the hotel-casino "one hundred percent union," and accused the Venetian of "union busting." While the dispute over the sidewalk was also prominently displayed by signs and slogans, I believe that the central message, which members of the public received from the demonstration, was that there was a "labor dispute" between the Union and the Venetian. I am of the view that the Respondent has failed to establish that the union demonstrators were not involved in a labor dispute. Accordingly, I conclude that the actions of the demonstrators on March 1 constituted protected activity under Section 7 of the Act. Also see *Bristol Farms*, 311 NLRB 437 (1993).

3. The Union had the right to rally on the Venetian's sidewalk

As I have mentioned above, in his posthearing brief, counsel for the Respondent seems inclined to attempt to relitigate the issue of the nature of the sidewalk in front of the facility. However, as I indicated earlier, this issue has been definitively decided by the Federal Courts. The sidewalk in question, although the private property of the Respondent, is a "public forum" for purposes of First Amendment expressive activity. The union demonstrators were engaged in just that type of expressive activity when they gathered on March 1 for the purpose of communicating to prospective employees and the general public the nature of their labor dispute with the Venetian. It seems obvious to me that the most logical place for the Union to have conducted the demonstration was on the temporary construction walkway, which was situated along the front of the Venetian's property at approximately the same location as the permanent sidewalk would ultimately exist.

This, of course, was the area nearest the front of the hotel-casino, which would be the most reasonable place for the demonstrators to hold their rally. From this point there would be no confusion in the minds of prospective employees and the general public, the intended audience, that the Union's labor dispute was with the Venetian. As a "public forum," the sidewalk in question was the place where the union demonstrators could legally gather and engage in protected union activity under Section 7 of the Act. That is precisely what they did.

4. The Respondent's actions constituted a violation of the Act

In its answer to the complaint, the Respondent admits that on March 1 its agents, the security guards, summoned the Las Vegas Metropolitan Police and requested that the demonstrators be issued citations and excluded from the sidewalk in front of its facility. Further, the Respondent admits and the evidence establishes that the Respondent caused the recording of a trespass message and the repeated playing of that message over a loudspeaker during the demonstration. The Respondent also admits that its agents informed union business agent Glen Arnodo on March 1 that he was being placed under citizen's arrest, and the following day its agents contacted the Las Vegas Metropolitan Police to make a report of the incident. The Respondent acknowledges that it took these actions as a direct response to the Union's demonstration on its private sidewalk, which the Respondent viewed as trespassing. According to the Respondent, these actions were "pre-litigation" activities, which the Respondent alleges constituted "constitutionally protected petitioning," or were at least incidental to and intertwined with such petitioning. Of

course, the General Counsel contends that these actions constituted a violation of Section 8(a)(1) of the Act.

In *Bristol Farms*, *supra*, the Board stated, "It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1) so long as the union representatives are engaged in activity protected by Section 7 of the Act. See, e.g., *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984)." The Board went on to say that:

> Further, an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities. See *Polly Drummond Thriftway*, 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery*, 282 NLRB 351 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

As I concluded earlier, the union demonstrators were engaged in activity protected by Section 7 of the Act when they participated in the rally conducted on the Respondent's sidewalk on March 1. The Federal Courts having decided that the sidewalk in question is a "public forum" for the purpose of First Amendment expressive activity, the union demonstrators had a constitutional right to conduct their rally on the sidewalk. Therefore, regardless of whether the sidewalk was for purposes of the demonstration considered "public property" or "private property" upon which the Respondent lacked a property right entitling it to exclude the demonstrators, the result would be the

same. The actions of the Respondent in attempting to have the union demonstrators removed from the sidewalk, as alleged in the complaint, violated Section 8(a)(1) of the Act. *Bristol Farms*, supra. The Respondent's contention that it was simply attempting to protect its private property from trespassers is of no avail. According to the Federal Courts, while the Respondent retains the sidewalk as its private property, it has lost the right to have the demonstrators removed from what has become a "public forum" for the purpose of expressive activity. In other words, the Respondent lacks a property right entitling it to exclude the union demonstrators, who were engaged in protected Section 7 activity. Without the requisite property interest, the Respondent's actions in attempting to remove the union demonstrators violated the Act under existing Board law. See *Indio Grocery Outlet*, 323 NLRB 1138 (1997).

Despite the adverse holdings by the Federal Courts in the sidewalk case litigation, the Respondent argues that its actions in attempting to have the union demonstrators removed from the sidewalk cannot be a violation of the Act as they constituted "pre-litigation" activities, which were incidental to and inextricably intertwined with the litigation. The Respondent relies heavily upon the Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). It is counsel for the Respondent's position, as set forth in his posthearing brief, that under the holding of that case an employer's lawsuit must be both objectively baseless and subjectively brought for an unlawful motive in order for the lawsuit to constitute a violation of the Act. Counsel believes that it is significant that in the present complaint the General Counsel has failed to allege the Respondent's filing of the Federal

litigation as a violation of the Act. Allegedly, this is because the General Counsel must know he could not prevail under the Supreme Court's decision in BE&K Construction Co. Counsel for the Respondent argues that in an earlier complaint the General Counsel alleged such a violation, however, following the Supreme Court's decision, the present complaint contained no such allegation.

It is not the proper role of an administrative law judge to speculate as to why certain matters are not alleged in a complaint. Alleging violations of the Act come within the exclusive province of the Regional Director and the General Counsel. As the complaint before me contains no such allegation, I need not consider the question of whether the Respondent's lawsuit was a violation of the Act, or not. However, counsel for the Respondent attempts to expand on the Supreme Court's decision in *BE&K Construction Co.*, arguing that it should include "pre-litigation" activities that are incidental to and intertwined with the actual filing of the lawsuit. Counsel does not cite any labor related cases for such a proposition, but does attempt to draw an analogy with the Supreme Court's holdings in antitrust cases.

According to the Respondent, in order to safeguard its constitutionally protected right to petition the Government through its Federal Court litigation on the sidewalk issue, it had to engage in certain pre-litigation activities. It is argued that if the Respondent failed to do so, it would effectively waive its right to sue. Among these pre-litigation activities were the following: (1) summoning the police and asking them to issue citations to demonstrators and eject them from its sidewalk; (2) recording the trespass message and repeatedly playing it to the demonstrators over the

public address system; and (3) informing Glen Arnodo that he was under citizen's arrest and contacting the police to make a report of the incident. Counsel for the Respondent argues that these actions were all protected as direct petitioning of governmental entities and/or inextricably intertwined with such petitioning so as to be constitutionally protected. According to counsel, without being able to take this action, the right to sue would essentially become meaningless as the Respondent would not be able to satisfy the "necessary prerequisite to establishing the need for injunctive relief and to avoid being found to have waived" the right to sue.

Assuming, for the sake of argument, that counsel's theory has some validity, this case would require the balancing of the Employer's right to engage in "pre-litigation activity" in defense of its property rights versus the rights guaranteed employees under the Act. In the facts of this case, I believe that employee rights under the Act should prevail. Those rights include some of the most basic sought to be protected by the Act, namely the right of the demonstrators to appeal to prospective employees that they should support the Union, and to appeal to the general public that they should not patronize the Venetian because it had a labor dispute with the Union. Both prospective employees and the general public had a corresponding right to receive this message. Despite the Respondent's denials, I believe that it was clear to all concerned at the time that a genuine "labor dispute" existed, that being the refusal of the Respondent to enter into a "neutrality agreement" with the Union. Under these circumstances, the Union's demonstration was certainly a manifestation of "union activity" in its most basic form.

In any event, however, I do not believe that a balancing test is appropriate in this case, as the Respondent has already been found by the Federal Courts to lack the requisite property interest in the sidewalk as would allow it to exclude the union demonstrators. Without such a property interest, there is no "right" of the Respondent to balance against the obvious Section 7 rights of the demonstrators. See *Victory Markets*, supra; *Bristol Farms*, supra.

Further, I am of the opinion that if the Respondent were permitted to have the union demonstrators removed from the sidewalk, which sidewalk was found by the courts to constitute a "public forum," it would have had a profoundly chilling effect on the demonstrators' Section 7 rights.[13] On the other hand, I am not convinced that the Respondent would have been at all foreclosed from exercising its right to petition the courts through a lawsuit without first interfering with the rights of the union demonstrators to participate in the rally on the Respondent's sidewalk. Under the facts of this case, I do not believe that the holding in *BE&K Construction Co.*, supra, is applicable.

The Respondent argues that it actions were reasonable and not unlawfully motivated and, thus, not a violation of the Act. According to the Respondent, its actions were taken as a good faith effort to protect its property rights, and not in an effort to harm the Union or to deprive employees of their rights under the Act. The Respondent contends that under the Nevada

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[13] The Board case law makes it clear that it is the demonstrators' Sec. 7 rights that are violated by the Respondent's unlawful action. See *Bristol Farms, Inc.*, supra; *Gainesville Mfg. Co.*, supra.

State trespass statute,[14] which it cited to the demonstrators at the rally, it believed at the time of the demonstration that the demonstrators were in violation of the law. Additionally, the Respondent alleges that at the time of the demonstration it was aware of an earlier lawsuit in the "*MGM Grand* case," which counsel for the Respondent contends raised virtually identical questions regarding a hotel-casino's fight to exclude nonemployee demonstrators from its privately owned sidewalk, which was allegedly resolved favorably to the *MGM Grand*. (R. Exh. 2.)[15]

Further, the Respondent argues that there is no evidence in the record to suggest that the actions of the Respondent in attempting to have the demonstrators removed from its sidewalk were a "sham" intended to mask an unlawful motive. Counsel for the Respondent contends that the Respondent took the actions it did, which actions were precedent to filing the lawsuit,

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[14] Nevada Revised Statutes Section 614.160, Picketing. (R. Exh. 3.)

[15] I admitted into evidence, over counsel for the General Counsel's objection, a document from the *MGM Grand* case entitled stipulation for judgment of dismissal with prejudice and findings of fact and conclusion of law. I admitted the document because I was of the opinion, and continue to believe, that it is "marginally" relevant since it is part of the Respondent's defense that its actions against the demonstrators were taken in good faith. However, because of my ultimate conclusion regarding the Respondent's "motive" defense, it is unnecessary for me to closely analyze the document in question. Further, I would add that no two lawsuits involving different plaintiffs are ever identical, and my admission of the document into evidence should not be construed as my agreement with counsel for the Respondent's contention that the *MGM Grand* case raised "virtually identical questions" regarding a privately owned sidewalk, as in the Venetian case.

because it reasonably believed, based on the Nevada trespass statute and the *MGM Grand* case, that its private property claim was valid and its actions were necessary to protect its property rights. The Respondent argues that there is no evidence of "ill will" on its part.

While the Respondent may well have acted in "good faith" in this matter, its motives are not dispositive of the issue of whether its actions violated the Act. It is well established that in an 8(a)(1) case it is unnecessary to prove that an employer acted in bad faith or with improper motives. In *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the Supreme Court reversed the Court of Appeals, which had refused to reinstate two discharged employees because it concluded the employer had acted in good faith in discharging them. The Supreme Court disagreed, finding that the employer had violated Section 8(a)(1) of the Act, regardless of its motive.

In reiterating its long held position, the Board stated in *Phoenix Newspapers*, 294 NLRB 47, 50 fn. 19 (1989), that, "we note that in many cases involving employer sanctions against arguably protected activity . . . the employers raise sincere and quite tenable grounds for the argument that their actions were not motivated by the mere fact that employees were engaged in protected activities but rather were induced by alarm at the injurious effects of the protected activity. The Board did not take issue with the employers asserted motives but nonetheless found the alleged violations." Further, it is significant to note that neither *Indio Grocery*, supra, nor *Bristol Farms*, supra, contains any findings by the Board that the respective employers did not honestly believe in their asserted property rights.

Under the facts of this case, it is simply not pertinent whether the Respondent had a good-faith belief that its property right claim was meritorious. As decided by the Federal Courts, the Respondent did not have a property interest in the sidewalk sufficient to overcome the right of the union demonstrators to engage in expressive activity on the sidewalk, which had acquired the attributes of a "public forum." While the Respondent may very well have had a genuine good-faith belief in the legal correctness of its position, it acted at its own peril when it sought to remove the demonstrators from the sidewalk in question. Its actions had a chilling effect on the Section 7 rights of the demonstrators/employees to engage in union activity. The Respondent should not be able to violate the Act, merely because it desires to test a legal principle. As I noted, I do not view the Respondent's actions in attempting to have the demonstrators removed from the sidewalk as incidental to and inextricably intertwined with its lawsuit. I am not convinced that the Respondent would have been foreclosed from a lawsuit to settle the issue of whether the sidewalk was a "public forum," without first taking the actions it did to have the demonstrators removed. Good-faith motive or not, those actions violated the Act.

D. Summary

Based on the above, I conclude that the Respondent's conduct as described in paragraphs 5(b)(1), (2), and (3) of the complaint interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act. As such, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Venetian Casino Resort, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Summoning the Las Vegas Metropolitan Police and requesting that demonstrators on behalf of the Union, who were engaged in a peaceful demonstration, be issued trespass citations and excluded from the sidewalk in front of the Respondent's facility.

(b) Causing the recording of a trespass message and the playing of the message over a loudspeaker directed to demonstrators on behalf of the Union, who were engaged in a peaceful demonstration on the sidewalk in front of the Respondent's facility.

(c) Informing union business agent Glen Arnodo, who was engaged in a peaceful demonstration on behalf of the Union on the sidewalk in front of the Respondent's facility, that he was being placed under citizen's arrest, and the following day contacting the Las Vegas Metropolitan Police to make a report of the incident.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

1. The Respondent, Venetian Casino Resort, LLC, its officers, agents, successors, and assigns, shall cease and desist from

(a) Summoning the Las Vegas Metropolitan Police and requesting that demonstrators on behalf of the Union, who are engaged in a peaceful demonstration, be issued trespass citations and excluded from the sidewalk in front of the Respondent's facility.

(b) Causing the recording of a trespass message and the playing of the message over a loudspeaker directed to demonstrators on behalf of the Union, who are engaged in a peaceful demonstration on the sidewalk in front of the Respondent's facility.

(c) Informing union business agent Glen Arnodo, or any other demonstrator on behalf of the Union, who is engaging in a peaceful demonstration on the sidewalk in front of the Respondent's facility, that he is being placed under citizen's arrest, and contacting the Las

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[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Vegas Metropolitan Police to make a report of the incident.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. The Respondent, Venetian Casino Resort, LLC, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its casino-hotel in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1999.

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[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at San Francisco, California, on June 12, 2003.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT summon the Las Vegas Metropolitan Police Department and request that the police department issue trespass citations and remove individuals who are peacefully demonstrating and engaging in lawful conduct on behalf of Local Joint Executive Board of Las Vegas, Culinary Workers

Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union), or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada.

WE WILL NOT read or play a recording of a trespass message over a loudspeaker directed to individuals who are peacefully demonstrating and engaging in lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada.

WE WILL NOT place agents of the Union, or any other individuals, who are engaged in a peaceful demonstration and lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada, under citizen's arrest, or contact the Las Vegas Metropolitan Police Department to report the incident.

WE WILL NOT in any similar manner interfere with, restrain, or coerce individuals in the exercise of the rights guaranteed them by Federal labor law.

VENETIAN CASINO RESORT, LLC

APPENDIX C

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1396 September Term, 2006

Filed On: August 15, 2007

Venetian Casino Resort, L.L.C.,
Petitioner

v.

National Labor Relations Board,
Respondent

Local Joint Executive Board of Las Vegas,
Intervenor for Respondent

Consolidated with 05-1439

BEFORE: Randolph, Garland, and Griffith, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed June 22, 2007, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX D

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1396 September Term, 2006

Filed On: August 15, 2007

Venetian Casino Resort, L.L.C.,
Petitioner

v.

National Labor Relations Board,
Respondent

Local Joint Executive Board of Las Vegas,
Intervenor for Respondent

Consolidated with 05-1439

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX E

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-1396 September Term, 2006

Filed On: August 15, 2007

Venetian Casino Resort, L.L.C.,
Petitioner

v.

National Labor Relations Board,
Respondent

Local Joint Executive Board of Las Vegas,
Intervenor for Respondent

Consolidated with 05-1439

BEFORE: Randolph, Garland, and Griffith, Circuit Judges

ORDER

It is ORDERED that the proposed judgment submitted by the National Labor Relations Board be approved and is hereby adopted as the judgment of the court, replacing the judgment entered herein on June 18, 2007.

Per Curiam

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VENETIAN CASINO RESORT, LLC

Petitioner/Cross-Respondent — Nos. 05-1396

v. — & 05-1439

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner — Board Case No.

and — 28-CA-16000

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS LOCAL 226 AND HOTEL EMPLOYEES LOCAL 165

Intervenor

JUDGMENT ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: RANDOLPH, GARLAND, and GRIFFITH, Circuit Judges

THIS CAUSE came to be heard upon a petition filed by Venetian Casino Resort, LLC, Las Vegas, Nevada, to review an order of the National Labor Relations Board in Board Case No. 28-CA-16000, issued against said Petitioner, its officers, agents, successors, and assigns, on September 30, 2005, and a cross-application by the National Labor Relations Board for enforcement of said Order. The Court heard argument of respective counsel and has

considered the briefs, appendix of pertinent record materials, and other submissions filed in this cause. On May 8, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order in part and remanding in part for the Board's consideration. In conformity herewith, it is hereby:

ORDERED AND ADJUDGED by the Court that the Petitioner, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Causing the recording of a trespass message and the playing of the message over a loudspeaker directed to demonstrators on behalf of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO (the Union), who are engaged in a peaceful demonstration on the sidewalk in front of the Petitioner's facility.

   (b) Informing union business agent Glen Arnodo, or any other demonstrator on behalf of the Union, who is engaging in a peaceful demonstration on the sidewalk in front of the Petitioner's facility, that he is being placed under citizen's arrest, and contacting the Las Vegas Metropolitan Police to make a report of the incident.

   (c) In any like or related manner interfering with, restraining, or coercing employees in

the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its casino-hotel in Las Vegas, Nevada, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Petitioner has gone out of business or closed the facility involved in these proceedings, the Petitioner shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Petitioner at any time since March 1, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

FURTHERMORE, to the extent the Board's Order is not enforced in the Court's May 8, 2007, decision, those matters are remanded to the Board for further proceedings consistent with the May 8, 2007, opinion.

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT
OF THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT read or play a recording of a trespass message over a loudspeaker directed to individuals who are peacefully demonstrating and engaging in lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada.

WE WILL NOT place agents of the Union, or any other individuals, who are engaged in a peaceful demonstration and lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada, under citizen's arrest, or contact the Las Vegas Metropolitan Police Department to report the incident.

WE WILL NOT in any similar manner interfere with, restrain, or coerce individuals in the exercise of the rights guaranteed them by Federal labor law.

VENETIAN CASINO RESORT, LLC

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 07-633

In the Supreme Court of the United States

VENETIAN CASINO RESORT, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices, in violation of 29 U.S.C. 158(a)(1), by broadcasting a message to union demonstrators stating that they were subject to arrest for committing criminal trespass and by attempting a citizen's arrest of a union official.

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In the Supreme Court of the United States

No. 07-633

VENETIAN CASINO RESORT, LLC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 484 F.3d 601. The decision and order of the National Labor Relations Board (Pet. App. 25a-62a) are reported at 345 N.L.R.B. No. 82.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2007 (Pet. App. 65a). A petition for rehearing was denied on August 15, 2007 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on November 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 7 of the National Labor Relations Act (NLRA) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1).

In circumstances in which an employer has a right to exclude others from its property, the employer generally does not violate the NLRA when it prevents nonemployee union organizers from trespassing on the property to distribute union literature. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537-538 (1992). That rule does not apply, however, when the employer does not have a right to exclude others. On the contrary, an employer that lacks a right to exclude violates Section 8(a)(1) when it seeks to exclude from private property nonemployees engaged in protected Section 7 activity. See *United Food & Commercial Workers Int'l Union Local 400* v. *NLRB*, 222 F.3d 1030, 1034-1035 (D.C. Cir. 2000) (*UFCW Local 400*); *NLRB* v. *Calkins*, 187 F.3d 1080, 1083, 1095-1096 (9th Cir. 1999), cert. denied, 529 U.S. 1098 (2000).[1]

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[1] See generally *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union [organizers] to obtain access to an employer's property under limited circumstances.")

b. Conduct that might otherwise violate a federal statute may be immunized from liability when necessary to ensure that the statute does not abridge the First Amendment right to petition the government. For example, activities that could be deemed to violate the antitrust laws are immune from liability under the *Noerr-Pennington* doctrine if they constitute, or are sufficiently related to, genuine efforts to petition the government. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 137-138 (1961), and *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-672 (1965); see also *California Motor Trans. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (recognizing that the right to petition includes a right of access to the courts). The *Noerr-Pennington* doctrine does not, however, provide antitrust immunity for every concerted effort to influence government action. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (*Allied Tube*). Rather, whether activity is immune depends on "the context and nature of the activity." *Id.* at 504. For example, immunity does not apply if the context and nature of the challenged activity indicate that it is the type of commercial activity that has traditionally had its validity determined by the antitrust laws. *Id.* at 505.

The Court has been sensitive to the First Amendment right to petition when determining whether the filing of a lawsuit violates the NLRA. For example, in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), the Court held that, because of First Amendment concerns, Section 8(a)(1) of the NLRA does not authorize the National Labor Relations Board (Board) to enjoin as an unfair labor practice the filing and prosecution of a well-founded lawsuit, even if the suit was motivated

by the employer's desire to retaliate against the defendant for exercising rights protected by the NLRA. See *id.* at 743. And in *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516 (2002), the Court held that Section 8(a)(1) does not authorize the Board to declare unlawful a completed lawsuit that was reasonably based but unsuccessful merely because it was filed for a retaliatory purpose. *Id.* at 536. In the NLRA context, neither this Court nor any court of appeals has addressed whether immunity extends to activity distinct from but related to the right to petition, such as activity incidental to the filing of a reasonably based lawsuit.

2. Petitioner operates the Venetian Casino Resort (Venetian), a luxury hotel and casino in Las Vegas, Nevada. In 1999, the Venetian was built on the site along Las Vegas Boulevard where the smaller Sands Casino and Hotel (Sands) once stood. To accommodate the projected increase in traffic, the local government agreed to expand the street by one lane, which would displace the public sidewalk in front of petitioner's property. Petitioner agreed to build a replacement sidewalk on its property that would run parallel to the street. In February 1999, the existing sidewalk was demolished and a temporary sidewalk constructed where the permanent one would be built. Pet. App. 1a-2a.

At approximately the same time, the local media reported that the Culinary Workers Union, Local 226, and Bartenders Union, Local 165 (collectively, Union), planned to hold a demonstration on the temporary sidewalk to protest the fact that petitioner, unlike the Sands, did not have a union contract. Although petitioner had not yet begun hiring staff, it had assembled an employment package for new employees, which its owner claimed was superior to the Union's. Pet. App. 2a-3a.

In an effort to prevent the demonstration from taking place, a representative of petitioner met with the local district attorney (DA). A news article published before the meeting reported that the DA had stated that the sidewalk was only "quasi-private" property and it was therefore unclear whether petitioner had a right to block or to remove demonstrators. When petitioner's representative met with the DA, the DA stated that his office would not enforce the Nevada trespass law against the demonstrators. Petitioner's representative also spoke with the Las Vegas Police Department, which told him that the police would not arrest the demonstrators for trespass. In preparation for the rally, petitioner marked its property line on the sidewalk with bright orange paint and posted signs stating that the sidewalk was private property. Pet. App. 3a-4a.

On March 1, 1999, more than 1000 demonstrators—many wearing T-shirts, buttons, and pins with union messages—marched on the sidewalk. Demonstrators carried signs, and speakers addressed the Union's labor dispute with petitioner. Throughout the demonstration, petitioner broadcast a recorded message over a loudspeaker system announcing that the demonstrating "culinary and union workers" were subject to arrest for criminal trespass on private property. Petitioner also requested that the police remove the demonstrators from the sidewalk. Petitioner's security guards told a union official who was leading the demonstration that he was being placed under "citizen's arrest," but he was not taken into custody. The next day, petitioner contacted the police to report the "arrest." Pet. App. 4a-5a.

On March 4, 1999, petitioner filed a complaint in federal district court seeking declaratory and injunctive relief against county officials, the Las Vegas Police De-

partment, and the Union on the ground that their conduct converted petitioner's private property into a public forum in violation of the Takings Clause of the Fifth Amendment. Pet. App. 5a. The district court denied petitioner's request for a preliminary injunction, holding that, because "the sidewalk performs an essential public function, [petitioner] does not have the right to exclude individuals from the sidewalk based upon permissible exercises of their right to expression under the First Amendment." *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 45 F. Supp. 2d 1027, 1036 (D. Nev. 1999). The district court subsequently granted summary judgment against petitioner. The Ninth Circuit affirmed the district court's judgment, and this Court denied review. *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), cert. denied, 535 U.S. 905 (2002).

3. a. Based on an unfair labor practice charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by interfering with the Union's demonstration, which was protected activity under Section 7, 29 U.S.C. 157, when petitioner: (1) broadcast its message warning the demonstrators that they were committing criminal trespass, (2) attempted a citizen's arrest of a union official and reported the arrest to the police, and (3) summoned the police to remove demonstrators from the sidewalk. Pet. App. 30a, 32a.[2]

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[2] The complaint also initially alleged that petitioner's unmeritorious lawsuit violated Section 8(a)(1) because it was brought in retaliation for the Union's demonstration. See Pet. App. 30a & n.1, 51a-52a. After this Court's decision in *BE&K*, the General Counsel issued an amended complaint deleting that allegation. See *id.* at 52a.

b. After a hearing, an administrative law judge (ALJ) issued a decision finding that petitioner committed the unfair labor practices, as alleged, when it broadcast the trespass message, attempted the citizen's arrest, and summoned the police to remove demonstrators from the sidewalk. Pet. App. 29a-62a. The ALJ concluded that Section 7 of the NLRA protected the union demonstration. In so doing, the ALJ rejected petitioner's claim that it had the right to exclude the demonstrators from the sidewalk, noting that the federal courts had conclusively determined that petitioner had no such right. *Id.* at 44a-49a.

The ALJ also rejected petitioner's contention that its actions could not violate the NLRA because they constituted "pre-litigation activities" that were "incidental" to its March 4, 1999, federal district court lawsuit. Pet. App. 49a-57a. Petitioner claimed that its actions were "necessary prerequisites" to its direct petitioning of the federal court for declaratory and injunctive relief, because, if petitioner had not taken those actions, it would have been unable "'to establish[] the need for injunctive relief and to avoid being found to have waived' [its] right to sue." *Id.* at 53a (quoting petitioner's counsel). The ALJ concluded that petitioner's immunity defense was not supported by controlling precedent or the facts of the case. *Id.* at 54a-57a. The ALJ stated that *BE&K*, upon which petitioner relied, was inapplicable because petitioner's lawsuit was not *itself* alleged to be an unfair labor practice. *Id.* at 54a. The ALJ observed that petitioner cited no "labor related cases for [its] proposition" that *BE&K* should be expanded to include "pre-litigation activities" incidental to the filing of a lawsuit. *Id.* at 52a. And the ALJ was unconvinced that petitioner would have been "at all foreclosed from exercising its right to

petition the courts through a lawsuit without first interfering with the rights of the union demonstrators." *Id.* at 54a.

c. The Board affirmed the ALJ's findings that petitioner violated Section 8(a)(1) by broadcasting the trespass message, attempting the citizen's arrest and reporting it to the police, and summoning the police to remove demonstrators from the sidewalk. Pet. App. 25a-29a.

4. The court of appeals upheld the Board's findings that petitioner's efforts to disrupt the demonstration by broadcasting the criminal trespass message and attempting a citizen's arrest of the union agent were unfair labor practices. The court remanded the case for the Board to determine whether petitioner's summoning of the police was protected by the First Amendment as a direct petition, because the Board had not addressed that question. Pet. App. 1a-24a.

a. The court first concluded that the Union's demonstration was protected by Section 7 of the NLRA. Pet. App. 7a-16a. In doing so, the court rejected petitioner's claim that, under *Lechmere*, it had a right to deny the demonstrators access to the sidewalk. *Id.* at 13a-14a. The court explained that petitioner's argument "misses a fundamental point of *Lechmere*," which "allows an employer the right to deny access to its premises only where it has a property right to do so, and as the Ninth Circuit held, [petitioner] has no property right to the sidewalk that permits it to prevent people, like the demonstrators here, from exercising their First Amendment rights." *Id.* at 13a.

b. The court of appeals also rejected petitioner's argument that the "*Noerr-Pennington* doctrine should be extended to create a safe harbor" for petitioner's

broadcast of the trespass message and its attempted citizen's arrest. Pet. App. 17a. Petitioner contended that its activities were immune from liability under *Noerr-Pennington* because, according to petitioner, they were "pre-litigation activities" that were "necessary prerequisites" to its unsuccessful lawsuit for declaratory and injunctive relief. *Id.* at 19a-20a. Relying on *Allied Tube*, the court rejected that contention. *Id.* at 20a-21a.

The court of appeals observed that "[t]he Supreme Court has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning," such as lawsuits, but "has yet to" decide whether immunity in the labor law context covers "incidental" conduct. Pet. App. 20a (citing *Bill Johnson's Restaurants* and *BE&K*). The court concluded, however, that it did not need to decide that issue because petitioner failed "to show that its conduct was in fact 'incidental' to its lawsuit under the holding of *Allied Tube*." *Ibid.*

The court of appeals noted that *Allied Tube* rejected the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." Pet. App. 19a (quoting *Allied Tube*, 486 U.S. at 503). Rather, the court stated, *Allied Tube* explained that "incidental" activity "is not protected by *Noerr-Pennington* if its 'context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.'" *Ibid.* (quoting *Allied Tube*, 486 U.S. at 505).

Adapting that test to the labor law context, the court of appeals concluded that the "'context and nature' of [petitioner's] conduct shares more with * * * [S]ection 7 cases * * * than it does with 'pre-litigation' activity." Pet. App. 21a. In support of that conclusion, the court

cited four Section 7 cases in which the Board or reviewing courts had found that activity similar to petitioner's constituted an unfair labor practice. See *id.* at 16a (citing *UFCW Local 400* v. *NLRB*, 222 F.3d at 1039; *Calkins*, 187 F.3d at 1083; *Wild Oats Market, Inc.*, 336 N.L.R.B. 179, 181 (2001); and *D'Alessandro's, Inc.*, 292 N.L.R.B. 81, 83-84 (1988)). The court also noted that "no case or statute" supports petitioner's claim that its actions were "necessary prerequisite[s]" to its lawsuit. *Id.* at 20a. Indeed, the court observed, "[t]here is no evidence that [petitioner's] conduct is customary 'prelitigation' activity." *Id.* at 21a. And, the court concluded, petitioner's claim that its actions were intended to give notice of trespass as required by Nevada trespass law was irrelevant, because petitioner did not file a trespass lawsuit, but a suit seeking "forward-looking relief"—an injunction and declaratory judgment. *Ibid.*

The court also found unavailing petitioner's reliance on *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Pet. App. 21a-22a. In *Sosa*, the Ninth Circuit held that a satellite television company was immune under the *Noerr-Pennington* doctrine from liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for sending letters demanding payment from, and threatening litigation against, individuals it claimed had illegally accessed its satellite signal. *Sosa*, 437 F.3d at 925-926, 942. The court of appeals explained that *Sosa* was "of no help" to petitioner because its holding was "limited to a narrow category of 'incidental' activity: '[p]relitigation communication[] demanding settlement,' that the [Ninth Circuit] found had a 'sufficiently close' connection" to the right to access the courts. Pet. App. 22a (quoting *Sosa*, 437 F.3d at 936). The *Sosa* court cited several reasons

for that holding, including the facts that letters inviting parties to settle legal claims before a lawsuit are "a common, if not universal, feature of modern litigation," and that "many states, including California, protect prelitigation communications under statutorily granted litigation privileges." 437 F.3d at 936. The court of appeals noted that here, in contrast to *Sosa*, petitioner's "broadcasting the trespass warning message and making the 'citizen's arrest' ha[d] nothing at all to do with the right to 'access[] the courts.'" Pet. App. 23a (quoting *Sosa*, 437 F.3d at 936). Thus, the court concluded, petitioner would not be entitled to immunity even under "the reasoning of the *Sosa* court," "because [petitioner] cannot show that its 'pre-litigation' activities are 'sufficiently close' to its lawsuit." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly noted that this Court "has extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning," such as the lawsuits at issue in *Bill Johnson's* and *BE&K*, and the Court "has yet to" decide whether immunity in the labor law context covers "incidental" conduct. Pet. App. 20a. Indeed, neither this Court nor any court of appeals has decided whether *Noerr-Pennington* immunity applies to activity "incidental" to direct petitioning in the labor context. The court of appeals appropriately declined to decide that question of first impression in this case because it correctly determined, under principles established by this Court in *Allied Tube*, that petitioner failed

to demonstrate "that its conduct was in fact 'incidental' to its lawsuit." *Ibid.*

As the court of appeals explained, *Allied Tube* held that, in the antitrust setting, "incidental" activity "is not protected by *Noerr-Pennington* if its 'context and nature . . . make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.'" Pet. App. 19a (quoting *Allied Tube*, 486 U.S. at 505). It follows that, even assuming that immunity in the labor-law context extends to activity that is "incidental" to direct petitioning, activity is not "incidental" if its "context and nature" make it the type of activity that has "traditionally had its validity determined by the [labor] laws themselves." *Allied Tube*, 486 U.S. at 505.

As the court of appeals correctly concluded (Pet. App. 19a-21a), petitioner's efforts to disrupt the Union's demonstration by broadcasting the criminal trespass message and attempting a citizen's arrest of the Union's agent are the kind of activity that has "traditionally had its validity determined by the [labor] laws." *Allied Tube*, 486 U.S. at 505. It is well settled that an employer that lacks a right to exclude others from property violates Section 8(a)(1) when it seeks to exclude nonemployees engaged in protected Section 7 activity. See *UFCW Local 400*, 222 F.3d at 1034-1035; *Calkins*, 187 F.3d at 1083, 1095-1096. And there are numerous cases in which conduct like petitioner's has been found to violate Section 8(a)(1). See Pet. App. 16a (citing cases). Moreover, as the court of appeals observed, "[t]here is no evidence that * * * conduct [like petitioner's] is customary 'pre-litigation' activity" for a suit seeking injunctive and declaratory relief, such as petitioner's. *Id.* at 21a. The court of appeals therefore

correctly determined that the "'context and nature' of [petitioner's] conduct shares more with * * * [S]ection 7 cases * * * than it does with 'pre-litigation' activity," *ibid.*, and petitioner's conduct is not entitled to immunity. The case-specific application of the *Allied Tube* standard to the particular circumstances of this case is not worthy of this Court's review.

2. Petitioner incorrectly contends (Pet. 8-12) that the decision of the court of appeals conflicts with *Sosa* v. *DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). Contrary to petitioner's contention (Pet. 9-10), there is no conflict with *Sosa* on the question whether *Noerr-Pennington* immunity under the NLRA extends to conduct that is "incidental" to direct petitioning. Neither court of appeals decided that question. The court below expressly declined to decide the question because the court concluded that petitioner had not established that its conduct was, in fact, "incidental" to its lawsuit. See Pet. App. 20a. And the Ninth Circuit did not decide the question in *Sosa* either, because that case involved the application of *Noerr-Pennington* immunity under RICO, not the NLRA. See *Sosa*, 437 F.3d at 925-926, 932-942.

Moreover, as the court below explained, *Sosa* is inapposite because its holding was "limited to a narrow category of 'incidental' activity: '[p]relitigation communication[] demanding settlement,' that the [Ninth Circuit] found had a 'sufficiently close' connection" to litigation. Pet. App. 22a (quoting *Sosa*, 437 F.3d at 936). As the court below correctly concluded, petitioner failed to establish that its conduct had the same kind of close connection to its subsequent lawsuit. *Id.* at 22a-23a. Petitioner's fact-bound disagreement with the court of ap-

peals on that question (Pet. 10-11) does not warrant this Court's review.[3]

Petitioner also erroneously contends that the decision below conflicts with *Sosa* because, according to petitioner, it "suggest[s] that [petitioner] was required to show that its pre-litigation actions were 'necessary prerequisite[s]' to injunctive relief in order to establish that the conduct was 'incidental' to its lawsuit." Pet. 11-12 (quoting Pet. App. 20a). Contrary to that contention, the court below did not hold that petitioner was entitled to immunity only if it showed that its conduct was "necessary prerequisite" to its lawsuit. Rather, the court correctly applied the "context and nature" inquiry that this Court employed in *Allied Tube*. See Pet. App. 20a-21a. The court of appeals addressed whether petitioner's conduct was a "necessary prerequisite[]" to its lawsuit only because *petitioner* argued that it was and that petitioner therefore qualified for immunity. See *id.* at 20a (quoting Pet. C.A. Br. 25). Petitioner cannot fault

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[3] Petitioner seeks to remedy the failure of proof found below by arguing for the first time in this Court that its actions constituted prelitigation activities under *Sosa* because they are "common features of litigation," or "authorized means of responding to unlawful trespass," under Nevada law. Pet. 10-11. Before the Board, however, petitioner argued only that its actions were incidental to its right to petition because they were "necessary prerequisite[s]" to its lawsuit for declaratory and injunctive relief, and petitioner made the same argument to the court below. See Pet. App. 20a (quoting Pet. C.A. Br. 25); *id.* at 53a (quoting petitioner's counsel). Having failed to raise its new arguments to the Board, and having alleged no "extraordinary circumstances" that would excuse its failure to do so, petitioner is jurisdictionally barred from raising them in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

the court of appeals for addressing petitioner's argument on its own terms.

3. Petitioner also incorrectly contends (Pet. 12-17) that this Court's review is warranted because the decision below contradicts *Lechmere* and misconstrues *Allied Tube*. The court of appeals' decision is entirely consistent with both *Lechmere* and *Allied Tube*.

Petitioner argues (Pet. 12-16) that *Lechmere* "plainly contradicts" the court of appeals' conclusion that petitioner's "conduct is of a type that 'has long been held to be governed by the NLRA.'" Pet. 13 (quoting Pet. App. 21a). Petitioner bases that argument on its assertion that *Lechmere* holds that "an employer generally is entitled to exclude nonemployee union demonstrators from its private property." Pet. 13-14. But that assertion is incorrect. As the court of appeals explained, petitioner "misses a fundamental point of *Lechmere*," which "allows an employer the right to deny access to its premises only where it has a property right to do so." Pet. App. 13a-14a. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 217 n.21 (1994); *Calkins*, 187 F.3d at 1088. Here, the Ninth Circuit's decision resolving petitioner's lawsuit definitively established that petitioner did not have the property right it claimed. See *Venetian Casino Resort* v. *Local Joint Executive Bd.*, 257 F.3d 937, 941, 948 (2001), cert. denied, 535 U.S. 905 (2002). Because petitioner did not have a right to exclude the demonstrators from the sidewalk, its interference with the protected union demonstration is conduct governed and prohibited by the NLRA.

Contrary to petitioner's contention, *Lechmere* does not hold that an employer's "good faith" attempt to protect its private property "ordinarily [is] immune from Board scrutiny." Pet. 15. Petitioner cites nothing in

Lechmere to support that contention, which cannot be squared with general legal principles underlying the NLRA. An employer may be held accountable under the NLRA when it interferes with activity protected by Section 7 in the good-faith but mistaken belief that employees were engaged in misconduct. See, *e.g.*, *NLRB* v. *Burnup & Sims*, 379 U.S. 21, 23-24 (1964) (good-faith but mistaken belief that employees engaged in protected activity had engaged in misconduct no defense); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945) (rejecting employer's claim of a right to ban its employees from engaging in organizing activities in nonwork areas on nonwork time).

Petitioner also contends (Pet. 16-17) that the court ofappeals' decision is inconsistent with *Allied Tube* because the court denied petitioner immunity even though it did not find that petitioner acted with an improper motive. Contrary to that contention, *Allied Tube* does not hold that immunity is unavailable only when a defendant acts with an improper motive. Although the Court's decision indicates that motive may be relevant, it makes clear that motive is not determinative. See *Allied Tube*, 486 U.S. at 504 ("The ultimate aim is not dispositive."); see also *id.* at 509-510 (stating holding in terms that do not require an improper motive). The court of appeals' decision is fully consistent with *Allied Tube*.

4. Petitioner also contends (Pet. 17-19) that the court of appeals' decision conflicts with *Noerr* and *BE&K* because the court failed to vacate the Board's finding that petitioner violated the NLRA by reporting its attempted "citizen's arrest" to the police. Petitioner asserts (Pet. 17) that its conduct in reporting the attempted arrest amounted to direct petitioning that was entitled to im-

munity under *Noerr* and *BE&K*. As petitioner acknowledges, however, the court of appeals "did not explicitly address" the question whether reporting the arrest was protected conduct. *Ibid.* Because the court of appeals did not address the issue, there is no conflict with *Noerr* or *BE&K*.

Although petitioner (Pet. 17) faults the court of appeals for failing to address the issue, the court was not required to do so because petitioner only summarily raised the issue in its briefs below. It is well settled that a court "will not address an 'asserted but unanalyzed' argument because 'appellate courts do not sit as self-directed boards of legal inquiry and research, but [rather] as arbiters of legal questions presented and argued by the parties.'" *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 613-614 (D.C. Cir. 2000) (citation omitted) (citing cases). See *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.) (a party must do more than "mention a possible argument in the most skeletal way, leaving the court to do counsel's work"), cert. denied, 494 U.S. 1082 (1990).

In the court of appeals, petitioner asserted, without argumentation or analysis, that "[t]he First Amendment gave [it] the express right to . . . make a report on an attempted citizen's arrest," claiming, in a conclusory fashion, that the report constituted a "direct and 'genuine effort[]' by [petitioner] to 'influence . . . law enforcement practices.'" Pet. C.A. Br. 24 (quoting *Noerr*, 365 U.S. at 144) (emphasis omitted). That was the full extent of petitioner's presentation of the issue to the court of appeals. Accordingly, it was well within the court's discretion to consider the issue only summarily raised and therefore "waived." *Sitka Sound Seafoods, Inc.* v. *NLRB*, 206 F.3d 1175, 1180-1181 (D.C. Cir. 2000)

(holding that argument "merely refer[red] to" in party's opening brief is waived).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 07-633

IN THE
SUPREME COURT OF THE UNITED STATES

VENETIAN CASINO RESORT, LLC,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

In its petition, Venetian Casino Resort, LLC (the "Venetian") established that this Court's review is necessary to resolve the conflict between the Court of Appeals and the Ninth Circuit on the issue of whether this Court's *Noerr-Pennington* doctrine, as applied in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), establishes a generic rule of construction under which courts must construe federal statutes so as to avoid burdening conduct that implicates the protections of the First Amendment's Petition Clause unless the statute clearly provides otherwise. Contrary to the arguments in the Opposition ("Opp.") of Respondent National Labor Relations Board ("NLRB" or "Board"),

the Court of Appeals' decision limits the scope of "incidental" activities protected under *Noerr-Pennington* in the context of Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), to conduct that is a necessary prerequisite to petitioning. The Court of Appeals' decision thus conflicts with the Ninth Circuit's interpretation of *BE&K* and *Noerr-Pennington*, and this Court should grant review to resolve that conflict.

Respondent also fails to refute our showing that review is necessary to resolve the conflict between the Court of Appeals' decision and this Court's holdings in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). The Court of Appeals found that actions such as the Venetian's in this case – broadcasting a message warning non-employee union demonstrators that they were trespassing on its privately-owned sidewalk, and attempting a "citizen's arrest" of one demonstrator – are ordinarily subject to NLRB scrutiny. But as discussed in our petition, *Lechmere* shows that an employer generally has the right to attempt to exclude nonemployee union demonstrators from its private property. Thus, actions such as the Venetian's ordinarily are immune from Board scrutiny under *Lechmere*, and are properly deemed to be "incidental" to direct petitioning activity under *Allied Tube*. Respondent fails to reconcile the Court of Appeals' contrary conclusion with *Lechmere* or *Allied Tube* – or with *BE&K*, under which an unfair labor practice finding cannot be predicated on an employer's reasonable but unsuccessful lawsuit to vindicate its right to exclude nonemployees from its private property.

The petition also demonstrated that the Court of Appeals' decision conflicts with *Noerr-Pennington* and *BE&K* by enforcing the Board's order that the Venetian violated the NLRA by directly petitioning the police to make a report on its attempted "citizen's arrest." Respondent erroneously argues that we waived this argument, and scarcely attempts to dispute the direct conflict in authority on this point. Respondent thus fails to detract from our showing that this Court's review is necessary to resolve all of these important questions regarding the interplay between the NLRA and the Constitutional right to petition.

1. Respondent strains to argue that the Court of Appeals' decision does not conflict with *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006), "on the question of whether *Noerr-Pennington* immunity under the NLRA extends to conduct that is 'incidental' to direct petitioning." Opp. 13. But Respondent ignores the Ninth Circuit's holding that *Noerr-Pennington* constitutes "a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause." *Sosa*, 437 F.3d at 931 (citation omitted). Contrary to Respondent's characterization, *Sosa*'s broad holding was not dependent on whether the statute at issue is RICO, as in *Sosa*, or the NLRA, as here. Indeed, the Ninth Circuit explicitly derived this "generic rule of statutory construction" from this Court's application of *Noerr-Pennington* to the NLRA in *BE&K*. *Sosa*, 437 F.3d at 931.

It is likewise unavailing for Respondent to rely on the Court of Appeals' interpretation of *Sosa* as being "'limited to a narrow category of "incidental" activity: "[p]relitigation communication[] demanding settlement," that the [Ninth Circuit] found had a "sufficient-

ly close" connection' to litigation." Opp. 13 (quoting Pet. App. 22a). Although the prelitigation communication in *Sosa* was a settlement demand, *Sosa*, 437 F.3d at 936, the Ninth Circuit inferred a "generic" rule from *BE&K*, not one "limited" to settlement demands or RICO lawsuits.

Contrary to Respondent's assertion, the Court of Appeals quite clearly suggested the Venetian was required to show that its pre-litigation actions were "necessary prerequisite[s]" to injunctive relief in order to establish the conduct was "incidental" to its lawsuit. App. 21a. Respondent surmises the Court of Appeals addressed this issue only "because *petitioner* argued" that its conduct was a necessary prerequisite to its lawsuit "and that petitioner therefore qualified for immunity." Opp. 14 & n.3 (italics in original) (citing Pet. App. 20a). But the Venetian's showing was broader: It "*reasonably believed* it had to issue trespass warnings to the nonemployee demonstrators and seek assistance from law enforcement as a necessary prerequisite to establishing the elements for injunctive relief – particularly the requirement that it had no adequate remedy at law – and to avoid being found to have waived the very property rights its lawsuit was filed to protect." Pet. C.A. Br. 25 (italics added), *cited at* Opp. 14 and Pet. App. 20a; *accord* C.A. App. to Br. 253, 262-63, 292-93; Pet. App. 54a-55a.[1]

The Venetian's showing was entirely consistent with this Court's holding that a railroad industry publicity campaign constituted "incidental" conduct

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[1] At page 9 of its Petition for Panel Rehearing and Rehearing *En Banc*, the Venetian explicitly called the Court of Appeals' attention to its misquotation of the Venetian's opening brief.

protected by the Petition Clause and outside the scope of antitrust liability because it reflected "*a genuine effort* to influence legislation and law enforcement practices." *Eastern R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961) (italics added). But the Court of Appeals did not address the Venetian's argument "on its own terms," Opp. 15, nor did it apply the generic rule of *Noerr Pennington*. Instead, it concluded that the Venetian's conduct was not protected because it was not actually necessary to the Venetian's lawsuit. Pet. App. 21a.

Respondent claims that the Venetian "argu[es] for the first time in this Court that its actions constituted prelitigation activities under *Sosa* because they are 'common features of litigation,' or 'authorized means of responding to unlawful trespass,' under Nevada law." Opp. 14 n.3 (citing Pet. 10-11). This representation is misleading and immaterial. The passage of the petition quoted by Respondent directly responded to *the Court of Appeals' conclusions*, in attempting to distinguish *Sosa*, that "broadcasting the trespass warning message and making the 'citizen's arrest' ... are neither common features of litigation nor statutorily protected litigation privileges," and that these activities therefore were not "sufficiently close" to the Venetian's lawsuit to merit First Amendment protection. Pet. App. 23a, *quoted at* Pet. 10. The Board made no such findings or conclusions in its decision. Pet. App. 25a-27a, 49a-57a.[2] As such, the Venetian's arguments were not "objections" that it was jurisdictionally required to

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[2] In fact, *Sosa* had yet to be decided at the time of the Board's 2005 decision. *See* Pet. App. 25a. The Board's decision also did not cite to *Allied Tube*, 486 U.S. 492, on which the Court of Appeals further relied on this point. *Compare* Pet. App. 20a-23a *with* Pet. App. 25a-62a.

raise before the Board. 29 U.S.C. § 160(e).[3] In any event, the Venetian has maintained repeatedly that its broadcast of the trespass warning and making of the "citizen's arrest" were protected as "incidental" to direct petitioning, *see* Pet. C.A. Br. 23-26, and the Venetian objected to the Board's contrary findings. C.A. App. to Br. 371-77.

Respondent dismisses the Venetian's disagreement with the Court of Appeals' conclusion as "fact-bound" and unworthy of review. Opp. 13-14. But Respondent fails to address our showing that the Court of Appeals' attempt to distinguish the instant matter from *Sosa* is illusory, and that the Court of Appeals manifestly failed to the generic rule of statutory construction that the Ninth Circuit inferred from *BE&K* and *Noerr Pennington*. The Court of Appeals' decision thus conflicts with the Ninth Circuit's interpretation of *BE&K* in *Sosa* and unduly limits *Noerr Pennington* in the context of labor law. Review should be granted to resolve this conflict.

2. Respondent unsuccessfully attempts to reconcile the Court of Appeals' decision with this Court's holdings in *Lechmere* and *Allied Tube*. Opp. 15-16. Contrary to Respondent's assertion, this Court in *Lechmere*, 502 U.S. at 535, clearly held that an employer generally is entitled to exclude nonemployee union demonstrators from its private property. Respondent quotes the Court of Appeals' statement that "*Lechmere* allows an employer the right to deny

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[3] The Court of Appeals thus contradicted the principle that it "cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings." *Macmillan Pub. Co. v. NLRB*, 194 F.3d 165, 168 (D.C. Cir. 1999) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)).

access to its premises only where it has a property right to do so." Opp. 15 (quoting Pet. App. 13a). But it is Respondent and the Court of Appeals who miss the fundamental and obvious point: *An employer generally has the "property right" to exclude nonemployee union demonstrators from its private property.*

This point is bolstered, not refuted, by Respondent's citation to *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999), which was decided "in the *fairly unique context* of California's limitation of [employers'] property rights in favor of rights of expression." *Id.* at 1083 (italics added, citation omitted). The Ninth Circuit explicitly contrasted California's unique law with "Nevada state law," which applies to the instant matter and categorically "restricts [trespassory] picketing during the pendency of a labor dispute." *Id.* at 1093-94 n.8 (citation omitted).

Respondent misplaces its reliance on the Ninth Circuit's *after-the-fact* determination that the Venetian lacked the right to exclude nonemployees demonstrators from its privately-owned sidewalk. Opp. 15 (citing *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 941, 948 (9th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002)). The Ninth Circuit never questioned the Venetian's presumptive right under Nevada law to prohibit picketing on its private property "without the written permission of the owner or pursuant to an order from a federal court or agency of competent jurisdiction." NEV. REV. STAT. § 614.160(1)(a). Instead, the court framed the question presented as "whether a sidewalk *constructed on private property* to replace a public sidewalk, accommodating pedestrian traffic adjacent to Las Vegas Boulevard, *is a public forum* subject to the protections of the First Amendment."

Venetian Casino Resort, 257 F.3d at 939 (italics added).

Respondent's analysis thus confirms that the unfair labor practice finding in this case rests entirely on the Venetian's *defeat* in its lawsuit to vindicate its right to exclude nonemployee demonstrators from its privately-owned sidewalk. Opp. 15. But this result contradicts this Court's holding in *BE&K* that an employer cannot violate the NLRA by pursuing a reasonably-based but unsuccessful lawsuit. *BE&K*, 536 U.S. at 536-37.

Respondent also is wrong to dispute that *Lechmere* stands for the proposition that an employer's good-faith attempts to protect its private property ordinarily are immune from Board scrutiny. Opp. 15-16. The employer in *Lechmere* took several good-faith measures to protect its private property. It confronted nonemployee organizers in the employer's parking lot, informed them that it prohibited solicitation or handbill distribution on its property, and asked them to leave. 502 U.S. at 529-30. Respondent found that these actions violated the NLRA, but this Court disagreed and denied enforcement of Respondent's order. *Id.* at 541. This Court reaffirmed the "general rule that 'an employer may validly post his property against nonemployee distribution of union literature.'" *Id.* at 538 (citation omitted).

It is inappropriate for Respondent to invoke the proposition that an employer may violate the NLRA "when it interferes with activity protected by Section 7 in the good-faith but mistaken belief that employees were engaged in *misconduct*." Opp. 16 (italics added). In both cases Respondent cites for this principle, the employer discharged employees for activity protected by the Act. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23

(1964) (unlawful to discharge employees "for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797 (1945) (unlawful to discharge employee for wearing union insignia in violation of no-solicitation rule). The Court of Appeals did not cite these cases, both of which are inapposite because neither addressed an employer's good-faith exercise of its constitutional right to petition or exclusion of nonemployees from the employer's private property.

Respondent further fails to show that the Court of Appeals' decision "is fully consistent with *Allied Tube*." Opp. 16. Contrary to Respondent's suggestion, *ibid.*, the statement in *Allied Tube* that "[t]he ultimate aim is not dispositive" did not pertain to the relevance *vel non* of *improper* motive, but instead supported the opposite proposition – the defendant could not avoid antitrust liability "simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action." 486 U.S. at 504. As Respondent concedes, Opp. 16, this Court in *Allied Tube* recognized the relevance of the defendant's improper motive "to lessen competition" and "reap substantial economic benefits from making it difficult for respondent to compete" in holding that the defendant's actions were not protected under the Petition Clause. 486 U.S. at 509.

Conversely, Respondent tacitly concedes that the Venetian acted for the good faith, nonretaliatory motive of protecting its private property rights. *See* Pet. App. 7a, 56a-58a. Nothing in *Allied Tube* supports the Court of Appeals' conclusion that the "context and nature of [the Venetian's] activity" falls outside the

scope of "incidental" activity protected under the Petition Clause. Instead, *Lechmere* shows that conduct such as the Venetian's ordinarily is immune from scrutiny under labor law. This Court should grant review to resolve the conflict between the Court of Appeals' decision and this Court's holdings in *Lechmere* and *Allied Tube*.

3. Respondent contends that the Court of Appeals' decision does not conflict with *Noerr* or *BE&K* because it did not explicitly address the Venetian's showing that its police report on the attempted citizen's arrest was protected as a direct and "genuine effort[]" to "'influence ... law enforcement practices." Opp. 16-17; *see* Pet. App. 24a, 53a. But as Respondent concedes, the Court of Appeals nevertheless affirmed Respondent's unfair labor practice finding as to the attempted citizen's arrest – which included the police report on the arrest. Opp. 16; Pet. App. 2a, 24a, 26a, 59a, 66a, 68a. It will not do for Respondent to characterize of the Court of Appeals' decision as merely "fail[ing] to vacate the Board's finding" on the citizen's arrest. Opp. 16. Respondent's orders are not self-executing; it must petition the Court of Appeals for enforcement. 29 U.S.C. § 160(e). Respondent makes *no attempt* to reconcile *Noerr* or *BE&K* with the Court of Appeals' enforcement of its order finding that the police report on the citizen's arrest violated the NLRA.

Respondent argues for the first time in this Court that the Venetian waived this issue because it "only summarily raised the issue in its briefs below." Opp. 17-18. Not so. Unlike the parties in the cases cited by Respondent, Opp. 17, the Venetian's brief set forth its "contentions and the reasons for them, with citations to the authorities and parts of the record on which [it relied]." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613

(D.C. Cir. 2000) (quoting FED. R. APP. P. 28(a)(9)(A)). The statement of facts in our Court of Appeals brief described the Venetian's unsuccessful attempt to have the police ("LVMPD") process the citizens' arrests and the Board's finding that this violated the NLRA. Pet. C.A. Br. 11, 15 (citing C.A. App. to Br. 9, 47-48, 161-62, 180-81, 293, 383-84, 391). After extensively analyzing relevant cases, *id.* at 17-23, our brief addressed the Board's finding on this issue:

> However, Venetian submits that all of the above-referenced pre-litigation activities were protected by the First Amendment as direct petitioning of governmental entities and/or as inextricably intertwined with such petitioning.
>
> LVMPD and the District Attorney are, of course, governmental law enforcement agencies and departments. The First Amendment gave Venetian *the express right* to contact the District Attorney and police department and ask that the police issue citations to demonstrators, eject demonstrators from the premises and make a report on an attempted citizen's arrest. These were *direct* and "genuine efforts" by Venetian to "influence ... law enforcement practices." ...

Id. at 23-24 (italics in original) (quoting *Noerr*, 365 U.S. at 144). Respondent does not, and cannot, identify what additional presentation was required to avoid waiver.

Nor did Respondent argue waiver in the Court of Appeals; it ignored the direct petitioning issue and argued that the Venetian's actions were not "incidental" because the Venetian ostensibly would not have been entirely "foreclosed" from pursuing its

lawsuit absent the activities. Resp. C.A. Br. 28-30. The Union *expressly acknowledged* that the Venetian's communications to demonstrators were "linked with a 'petition' for an arrest," Int. C.A. Br. 8, and conceded that the police report on the citizen's arrest did not violate the NLRA. *Id.* at 2, 7; *see* Pet. C.A. Reply Br. 3-7 & n.4. The Court of Appeals acknowledged our contention on this issue during oral argument, C.A. Tr. of Oral Arg. 13-15, 33-34, and never suggested that we waived the issue. Respondent offers no basis for a contrary conclusion. Nor does Respondent provide any additional support for disputing that the Court of Appeals' decision conflicts with *Noerr* and *BE&K* to the extent it enforces the Board's order finding the citizen's arrest and police report thereon violated the NLRA. This is another conflict in authority that warrants this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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